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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

OTOE AND MISSOURIA TRIBE OF INDIANS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on May 3, 1955.

OPINIONS BELOW

The opinions of the Indian Claims Commission are reported in 2 Ind. Cl. Com. 335, and, together with the Commission's findings of fact, appear in Appendix B, *infra,* pp. 69b-116b. The opinion of the Court of Claims, reported at 131 F. Supp. 265, appears in Appendix B, *infra,* pp. 1b-69b.

JURISDICTION

The judgment of the Court of Claims was entered May 3, 1955 (App. B, 1b, 69b). The jurisdic-

tion of this Court is invoked under 28 U. S. C. 1255 and section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U. S. C. 70s.

QUESTIONS PRESENTED

1. Whether Congress by section 2 of the Indian Claims Commission Act created liability, not otherwise existing, with respect to payment for original Indian title or right of occupancy as if it were equivalent to recognized Indian title.

2. Whether, if the Act creates such liability, it is to be measured by reference to the fee simple value of lands the claimants' ancestors occupied only under original Indian title.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 25 U. S. C. 70a, provides:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject

to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

* * * * *

STATEMENT

At the beginning of the nineteenth century the Otoe and Missouria Tribe of Indians, respondent, was located in what is now the southeastern part of Nebraska between the Platte River on the north and the Great Nemaha River on the south (App. B, 70b, 92b). The tribe continued to occupy villages in the Platte River area and to hunt over the area

between the Platte and Great Nemaha Rivers in Indian fashion up to the time of the negotiation of the treaties hereafter described (App. B, 92b-93b). The tribe also claimed an undefined area east of the Missouri River over which it sometimes roamed and hunted (App. B, 71b).

By the Treaty of July 15, 1830, 7 Stat. 328, respondent tribe, the Sacs and Foxes, the Omahas, the Ioways, and the Medawah-Kanton, Wahpacoota, Wahpeton and Sisseton Bands of Sioux, "being anxious to remove all causes which may hereafter create any unfriendly feeling between them, and being also anxious to provide other sources for supplying their wants besides those of hunting, which they are sensible must soon entirely fail them," jointly ceded and relinquished to the United States all their right and title to approximately 11,000,000 acres east of the Missouri River,[1] with the understanding that "the lands ceded and relinquished by this Treaty, are to be assigned and allotted under the direction of the President of the United States, to the Tribes now living thereon, or to other such Tribes as the President may locate thereon for hunting, and other purposes" (App. B, 72b-73b). For this cession of its claimed interest in these lands, respondent tribe received an annuity of $2,500.00 for 10 years, the services of a blacksmith and agricultural tools to the value of $500.00 per year for 10 years, participation in an

[1] These lands were for the most part located in what is now the State of Iowa, but they extended into southern Minnesota and northern Missouri (App. B, 72b).

educational fund, and a share in the distribution of goods valued at $5,132.00, all of which was to be "considered as a full compensation for the cession and relinquishments herein made" (7 Stat. at pp. 329-330). Subsequently, the United States desired to open part of this area to settlement by whites, and respondent tribe, by the Treaty of October 15, 1836, 7 Stat. 524, relinquished whatever rights it had retained in what is now the northwestern corner of Missouri for a consideration of $2,250.00 (App. B, 74b). Later, by the Treaty of March 15, 1854, 10 Stat. 1038, respondent tribe relinquished all claims that it might have had to lands east of the Missouri River, no specific portion of the total cash consideration of $463,423.74 given respondent by that treaty being allocated to such relinquishment (App. B, 80b-81b).

Meanwhile, by the Treaty of September 21, 1833, 7 Stat. 429, respondent tribe had ceded to the United States a tract of 792,000 acres lying between the Great Nemaha and Little Nemaha Rivers, being the southernmost portion of its claimed territory in Nebraska (App. B, 78b). For this cession respondent received a consideration of $39,410.15 (App. B, 79b). Later, by another provision of the Treaty of March 15, 1854, mentioned above, respondent ceded to the United States all of its remaining lands west of the Missouri River, being a tract of 1,250,000 acres lying between the Little Nemaha and Platte Rivers (App. B, 79b-80b). By this same treaty and a supplemental Treaty of December 9, 1854, 10 Stat. 1130, there was granted

to respondent a tract owned by the United States 10 miles wide by 25 miles long and containing 162,107.71 acres entirely outside of the area ceded by respondent (App. B, 79b-80b).

In its petition before the Indian Claims Commission asserting seven causes of action based upon inadequacy of consideration for these various relinquishments, respondent relied for recovery upon clauses (3) and (5) of section 2 of the Indian Claims Commission Act, *supra,* pp. 2-3. In view of the disposition made of four of the claims by the Commission and the Court of Claims,[2] only three (the first, third and fourth) are material here. Respondent tribe has not at any time asserted any greater right in the lands ceded than that of "original Indian title" (App. B, 5b, 92b, 96b, 99b).

The first cause of action asserted that the consideration (alleged to be 2.8 cents per acre) for respondent's relinquishment by the treaties of 1830, 1836 and 1854 of its rights in the lands east of the Missouri River was unconscionable (App. B, 91b-92b). In its opening brief before the Commission (p. 64), respondent conceded that its proof was not sufficient to establish "Indian title" in accordance with the usual standards, in that the evidence did not show any exclusive possession of a defined area. Consequently, its claim in this cause of action was based upon an undivided one-seventh interest in all

[2] These four claims (the second, fifth, sixth and seventh) were based upon events not referred to above, and each was dismissed by the Commission as not establishing a cause of action against the United States (App. B, 96b, 104b, 109b). The dismissals were affirmed by the Court of Claims (App. B, 48b, 64b, 68b).

of the lands east of the Missouri (App. B, 91b-92b). The Commission found that this area was used, occupied, and hunted over by a number of Indian tribes, including those who were parties to the treaties, but that no one tribe, including respondent, had exclusive possession of any definite part of the area, and, therefore dismissed this claim (App. B, 73b-74b, 93b). The Commission also concluded that respondent had at most only hunting rights to be exercised jointly with other tribes over an undefined area, and that the value of those hunting rights was growing less and less as the buffalo and other game disappeared (App. B, 93b). The Commission held that, even granting ownership of such rights, it was unable to determine their value, or that the compensation received therefor was inadequate or unconscionable, or that respondent had been unfairly treated (App. B, 93b). The Court of Claims has remanded this claim for further consideration based on additional evidence.[3]

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[3] While respondent's appeal was pending in the Court of Claims, it filed a motion requesting that the dismissal be vacated and that the cause of action be remanded to the Commission for reconsideration in the light of evidence as to the occupation of the area which had been adduced in another case before the Commission (App. B, 42b). Over objection by the Government, the court granted the motion for remand "since we find it necessary to remand the case on another issue" (App. B, 42b-44b). The other issue referred to by the court was the Commission's determination on offsets. The United States alone had appealed from such determination, but had abandoned its appeal in this respect by not briefing the issue in the Court of Claims. The court remanded the decision on offsets for further consideration in the light of its decision in another case which had been handed down while the appeal in this case was pending (App. B, 68b-69b).

In its third cause of action, respondent sought recovery on the ground that its rights in the 792,000 acres ceded by the 1833 treaty had been relinquished for an unconscionably low consideration (App. B, 96b). The Commission found that respondent had had Indian title to this area, that it had received payment at the rate of 4.9 cents per acre, and that the land had a reasonable value of 75 cents per acre in 1833, or a total of $594,000.00 (App. B, 96b-99b). It concluded that the consideration was unconscionable and that respondent was entitled to an award of $554,589.85, less any allowable offsets (App. B, 99b).[4] The Government appealed from this award on the legal grounds discussed below (pp. 10-11, 13-24, *infra*) and presented here for review, and for the further reasons that neither Indian title nor the determined value were established by the evidence (App. B, 48b-49b). The Court of Claims affirmed the award in all respects (App. B, 55b).

In its fourth cause of action, respondent sought recovery in connection with its 1854 cession of 1,250,000 acres, asserting that the consideration was unconscionable, or, in the alternative, so much less than true value as to indicate dealing less than fair and honorable on the part of the Government (App. B, 55b-56b). The Commission concluded that Indian title was established by the evidence

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[4] The Commission later determined the allowable offsets to be a total of $23,024.05 (App. B, 68b). This amount will probably be reduced upon the remand ordered by the Court of Claims, note 3, *supra*.

(App. B, 100b). The majority found that the consideration for the cession was 42 cents per acre, or a total of $463,423.74, that the value of the lands at the time of cession was $1.00 per acre, or a total of $1,087,892.29, and that, while the consideration might not have been so inadequate as to be unconscionable, it was, in view of all the facts and circumstances disclosed by the record, unfair and unjust to respondent (App. B, 100b-101b). The majority accordingly found respondent entitled to an award of $624,468.55 (the difference between $1,087,892.29 and $463,423.74), less any allowable offsets (App. B, 101b-102b).[5]

Both sides appealed from this award, respondent asserting that the determined value was too low, and the Government appealing on the legal grounds outlined below, plus the claim that the evidence did not support the findings as to Indian title or value

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[5] As has been noted (*supra*, p. 5), the 1854 treaty did not allocate the stated consideration between lands west of the Missouri River and those east of the river—providing simply a total payment of $463,423.74 and granting the tribe 162,-107.71 acres of government lands—and there was no evidence upon which any allocation could be based (App. B, 81b). A majority of the Commission dealt with this problem by concluding that all the consideration should be allocated to the lands west of the river, since any rights in lands to the east "were only hunting rights, the value of which are [*sic*] little, if anything," and by simply deducting the reservation lands granted the tribe on an acre for acre basis, leaving for consideration a net cession of 1,087,892.29 acres (1,250,000 less 162,107.71) (App. B, 100b). Associate Commissioner O'Marr dissented from the award on this claim, deeming it erroneous because of the lack of evidence as to the allocation of the consideration and the value of the lands granted to respondent (App. B, 110b-116b).

(App. B, 56b, 59b). The Court of Claims affirmed in all respects (App. B, 60b).

Insofar as material here, the Government's argument to the Court of Claims was that Congress by clauses (3) and (5) of section 2 of the Indian Claims Commission Act, *supra*, pp. 2-3, did not create a cause of action or admit liability in the Government when the treaty sought to be revised or the dealings claimed to be less than fair and honorable involved lands held under original Indian title, as opposed to a recognized title (see App. B, 5b-6b). In other words, the Government's position was that, as held in *Tee Hit Ton Indians* v. *United States*, 348 U.S. 272, a tribe's original Indian title or right of occupancy of certain lands was not a property right, that any payment made in the "purchase" of such lands was simply a gratuity, and hence that the amount paid could not be said to be unconscionably small, or "unfair" or "dishonorable."

After analysis of the legislative history of various bills leading up to the Act as finally enacted, the Court of Claims held that the primary purpose of the statute was to settle all meritorious claims of Indian tribes by creating causes of action and recognizing liability in the Government, and that the literal reading of clauses (3) and (5) required the inclusion of claims relating to Indian title land (App. B, 7b-19b). It buttressed this holding by reference to clause (4), relating to "claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands

owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant" (App. B, 20b-37b). The court held that under that clause Indian tribes could recover for every uncompensated taking of Indian title lands, and reasoned that therefore Congress must have intended recovery under clauses (3) and (5) when lands held under Indian title were ceded for an inadequate consideration (App. B, 21b). The court found support for its conclusions in this Court's references to the Indian Claims Commission Act in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 273-4, 281-282 (App. B, 37b-40b).

With respect to the valuation issue, the court considered the alternative of (1) valuing the lands involved on the basis of the value to the Indians of the use of the lands for subsistence for hunting, as against (2) the substantially higher value of the lands on the basis of the full fee title (App. B, 52b-54b). The court rejected the subsistence approach, stating, "Values cannot be determined on the basis of berries and wild fruits" (App. B, 55b), and held that the value of the fee should be the basis for the award.

REASONS FOR GRANTING THE WRIT

1. The questions presented are of fundamental and far-reaching importance in cases under the Indian Claims Commission Act. Like this case, 249 of the 396 cases now pending before the Commission involve claims based upon original

Indian title.[6] As indicated by the summary of these Indian title claims in Appendix A, *infra*, pp. 1a-5a, in 79 cases it is impossible to estimate the acreage involved, but the balance of the claims involve an estimated 1,323,165,061 acres, without deduction for overlaps among claims. (For comparison, the total land area of the United States is about 1,905,000,000 acres.) Under the decision below respondent tribe has recovered an award of $1,179,058.48, with the possibility of additional recovery on its first cause of action (see *supra*, pp. 6-7). Some indication of the Government's potential liability appears from the fact that respondent's claims, several of which were denied, included 4,162,472 acres, so that its present award is at the rate of approximately 25 cents per acre for all acres claimed, including those for which recovery was denied. The same rate of recovery on the total acreage estimated to be involved (1,323,165,061 acres) would indicate a total recovery on Indian title claims of more than $300,-

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[6] A few of these 249 cases involve claims relying upon clause (4), rather than clause (3) and/or (5), of section 2 (*supra*, pp. 2-3). As we indicate below (p. 20), a decision for the Government in the instant case might not dispose of the clause (4) claims based on original Indian title, although they would, of course, be determined favorably to the tribes under the decision of the court below. The more significant point, at any rate, is that the great majority of the claimants, like respondent in this case, invoke clauses (3) and (5) so that the ultimate result here will be decisive one way or the other in most instances.

000,000,[7] without considering at all the 79 cases in which areas have not been estimated. And, while varying in detail, the dealings of the United States with respondent are typical of the transactions had with other Indian tribes—for instance, the other six tribes claiming an interest in the lands east of the Missouri under the Treaty of 1830, *supra*, pp. 4-5.

It seems clear, therefore, that the number and magnitude of the cases directly affected by the decision below are closely comparable to the similar considerations underlying the granting of certiorari (with the Government's consent) in *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272. As in that case, the question here presented is important to future legislation designed to assure equality of treatment among the Indian tribes. A conclusion that the United States has assumed liability for original Indian title for claims asserted under the Indian Claims Commission Act will undoubtedly have a substantial bearing upon legislation relating to claims arising subsequent to that Act.

2. In a suit under the Indian Claims Commission Act, any award based solely upon inadequacy of consideration for the cession of Indian title lands seems erroneous. It is now settled that

[7] Of course, since lands for which an award was actually made in this case were valued at 75 cents and $1.00 per acre (*supra*, pp. 8-9) the maximum possible liability is many times the amount computed above.

original Indian title was not a compensable property right, that any payment for the relinquishment of such an interest in lands was a gratuity, and that no award may be made for the taking of this title "without specific legislative direction to make payment." *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 279-285, 288-291; *United States* v. *Tillamooks,* 341 U.S. 48; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 106, n. 28, quoted and applied in *Tee-Hit-Ton,* at 283. There is no such direction in clauses (3) and (5) of Section 2 of the Act. Since the original payment was a gratuity, it follows that any consideration, however small, for the treaty cession of Indian title lands cannot well be found to be "unconscionable" so as to afford a basis for revision of the treaty agreement, and cannot be said to indicate less than "fair and honorable dealings."[8] A nation exercising long-recognized powers of sovereign occupancy without compensation (see *Tee-Hit-Ton, supra,* at 279-281) should not be charged legally or ethically if its wholly

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[8] By the same token, duress and the other bases stated in clause (3) of section 2 as grounds for revision of a treaty or contract cannot justify the award of compensation for the cession of Indian title. We note, nevertheless, that the Court of Claims appears to have been mistaken when, in affirming the Commission's award on the fourth cause of action, it observed (App. B, 60b) that "The Commission believed that a certain amount of duress was practiced on the tribe in the negotiation of the treaty * * *." The Commission stated no such belief; indeed, it made the award, not under clause (3) (specifically allowing treaty revision for "duress," among other things), but under clause (5), relating to claims "based upon fair and honorable dealings * * *."

gratuitous payment is not as generous as the donee or a third person thinks it ought to be.

While Congress provided, in general terms, in clause (3) for treaties to be regarded as if revised on stated grounds, it does not follow that, as the Court of Claims reasoned (App. B, 10b, 17b-19b), treaties relating to lands under non-compensable Indian title should be treated identically with treaties concerning lands held under recognized Indian title. Similarly, the fact that Congress has permitted the court to adjudicate claims based upon "fair and honorable dealings" is no ground for concluding that the Act meant Indian occupancy should be treated as if it were a property right. Congress has explicitly enlarged the liability of the United States in some particulars, but it nowhere provided that Indian title should be altered and become a property right affording a basis for compensation. Having in mind the strictness with which such alleged assumptions of liability must be viewed (*Klamath Indians* v. *United States,* 296 U.S. 244, 250), the conclusion must be that the Act does not change the noncompensable nature of original Indian title.

The interpretation given to the legislative history of the Act by the Court of Claims as a basis for its contrary conclusion is erroneous. As the court observed (App. B, 11b), the history of the Indian Claims Commission Act begins with the so-called Meriam Report (Institute for Government Research, *The Problem of Indian Adminis-*

tration (1928)). That report (pp. 19, 468, 805) pointed out that the existence of Indian claims was a serious impediment to the progress of the race because, in the mind of the Indian, justice was being denied and, regardless of the validity of the claims, the possibility of some day receiving large awards was influencing the individual Indians to refuse to work or make definite plans for their future. These attitudes rendered extremely difficult any cooperation between the Government and the Indians. In recommending the earliest possible settlement of all such claims, the report stated (p. 468): "If a claim is good it should be declared so at once in order that the money due may be available for the advancement of the Indian, while if it is bad it is equally important that the Indians should know it, so that they may put aside their dreams of wealth and go to work to improve their economic status by their own efforts." The House Committee on Indian Affairs, in favorably reporting the bill which was eventually enacted as the Indian Claims Commission Act, also referred to the existence of claims as a serious barrier to the economic progress of the Indian and stated that the "primary objective" of the bill was "to grant the Indian his long-delayed day in court." H. Rept. No. 1466, 79th Cong., 1st sess., pp. 1-2, 5-6. And while it is clear that the Committee, in keeping with the recommendation of the Department of the Interior, intended to make the jurisdiction of the Commission

broad enough so that all possible claims could be adjudicated, *i.e.,* allowed or denied (*id.,* pp. 10, 14-16), there is nothing in the report to indicate an intention of creating a liability not previously existing on all such claims. To the contrary, the limits of any such admission of liability were carefully set out. *Id.,* pp. 10-12.

The subsequent legislative history does not change the picture. The Senate Committee on Indian Affairs amended section 2 of the bill as passed by the House by striking out clauses (3) and (4) (the "revision of treaties" clause and the "taking without just compensation" clause), but leaving in the bill the clause dealing with claims based on fair and honorable dealings (clause (5) as finally enacted). Its report stated (S. Rept. No. 1715, 79th Cong., 2d sess., p. 5):

> The language stricken on page 1, and through line 23 on page 2 in section 2, is not clear and it is believed that if it is not eliminated litigation would be necessary to determine its meaning. The charge has been made that the stricken language might be interpreted to establish new rules of substantive law which would have the effect of prejudging the merits of particular cases. The committee is interested in providing a forum for the Indian claimants to assert their claims and not, of course, in prejudging particular claims against the Government. This amendment is

> recommended for purposes of clarification and there is no intention on the part of the committee to deprive claimants of the right to invoke the jurisdiction of the Commission in any case which would have been cognizable under the language of the bill as it passed the House.

Obviously, the Senate Committee's chief interest, like that of the House Committee, was in providing a forum for the adjudication of Indian claims rather than in creating new causes of action and admitting liability.

The bill as amended in committee was passed by the Senate, and the conferees subsequently agreed to the reinsertion in the bill of clauses (3) and (4). The managers on the part of the House explained that the reason for such action was that the conferees "wanted to make sure that if any tribal claimant could prove facts *sufficient to make a case* under either of these classifications, the Commission would have authority to make an award to such claimant. * * * Both of the classes of claims reinserted by this amendment may fall within the category of 'fair and honorable dealings.' To set them forth explicitly helps to clarify the contents of that category." H. Rept. No. 2693, 79th Cong., 2d sess., pp. 5-6 (emphasis added). The primary intent of Congress remained to provide a forum for all claims rather than, as the Court of Claims reasoned (App. B, 16b-17b), to admit liability and direct payment in all cases for which a forum was provided.

We should not be taken as contending that the Act did not in any case admit liability and direct payment. For example, there can be no doubt that Congress intended by clause (3) to permit a treaty to be considered as revised if specified grounds exist. But there is no indication in the Act or legislative history which would justify the conclusion that Congress thereby intended to raise the status of Indian title to that of a compensable property right and to authorize additional payments beyond the amounts gratuitously given by Congress when such lands were originally acquired. Rather, the reasonable conclusion is that Congress was providing a remedy only for those cases in which Indians had legal or equitable rights similar to those which would support relief under general contract or property law,[9] and, to the extent specified in the Act, was simply expanding the protection accorded to such rights. As we have shown, *supra,* pp. 13-14, unrecognized Indian title is not such a right. And, if clause (3) did not create a cause of action in claims such as are here presented, it is plain that the "fair and honorable dealings" provision in clause (5) did not do so either. See H. Rept. No. 1466, 79th Cong., 1st sess., p. 12; H. Rept. No. 2693, 79th Cong., 2d sess., p. 6; Hearings, House Committee on Indian Affairs, on H. R. 1198 and H. R. 1341, 79th Cong., 1st sess., pp. 116-117.

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[9] Thus, contrary to the reasoning of the Court of Claims (App. B, 10b), relief could be afforded with respect to lands held under a recognized Indian title without any necessity, legally or morally inspired, of extending the same remedy to lands held under original Indian title.

The view that clause (3) created a cause of action for claims based on treaties dealing with Indian title land cannot be supported, as the Court of Claims concluded (App. B, 20b-21b), by reference to clause (4). The court reasoned (App. B, 21b): "If clause (4) permits Indian claimants to recover for the uncompensated taking (deprivation) by treaty or otherwise of a property right which in itself created no legal right in the owner against the Government, it would seem reasonable to conclude that Congress also intended that the same property right ceded under a ratified treaty of cession for a grossly inadequate consideration, would give rise to a cause of action under clause (3)." It may well be that clause (4) provides recovery, as did the special act in the *Tillamook* case, in cases where the appropriate government agents had agreed with the Indians on an amount to be paid for Indian title but for some reason the treaty was not ratified. As so construed, the Act would have the effect of equalizing the treatment of a claimant tribe with that of other tribes which had received payment for Indian title pursuant to their agreements. Cf. *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272, 284. But there is no warrant for the Court's assumption that clause (4) equalized all original Indian titles with recognized title, and that other clauses of the Act must be similarly broadened.

Striking evidence that no such result was intended is supplied by the legislative history of a bill pending at the time the Indian Claims Com-

mission Act was in the final stages of enactment. As indicated in the opinion of the court below (App. B, 31b), a number of proposed special jurisdictional acts were then pending, and it was the hope of Congress that passage of the Indian Claims Commission Act would obviate the necessity of acting on the other bills. Yet, on the same day that the House passed the general act it also passed a special bill which would have permitted the Salish and Kootenai Indians to sue and recover for the taking of Indian title "without compensation and without their consent." 92 Cong. Rec., pp. 5285, 5323. This bill was calendared in the Senate on the same day that the bill which eventually became the Indian Claims Commission Act was referred to committee, and it was soon favorably acted upon by the Senate. 92 Cong. Rec. 5328, 6901. If those in charge of both bills had intended that the Indian Claims Commission Act would create a cause of action for the taking of Indian title in all cases, it is clear that they would not have devoted time to the Salish-Kootenai bill. And the Executive reaction to both bills is further evidence of the contemporaneous interpretation of the Act in this respect. On June 28, 1946, President Truman vetoed the Salish-Kootenai bill, pointing out that the bill declared "any taking of the lands of the Indians by the United States, without compensation and without their consent ***, to be sufficient grounds for suitable relief," and stating, "Thus the bill does not merely waive the statute of limitations and laches, and provide a forum for the adjudica-

tion of any preexisting claims which the Indians may have against the United States, but it seeks to create liability against the Government which would not otherwise exist. * * * Neither on legal nor moral grounds would there seem to be any justification for legislation of this kind." 92 Cong. Rec. 7999. Yet, shortly thereafter, on August 13, 1946, President Truman signed the Indian Claims Commission Act, stating, "* * * we stand ready to submit all such controversies to the judgment of impartial tribunals." White House Press Release, August 13, 1946. Plainly, both the legislative and executive branches were of the view that the Claims Commission Act did not create unlimited liability for the extinguishment of Indian title claims.

3. Should it be determined that the Indian Claims Commission Act created liability and directed payment of claims based upon Indian title such as are here involved, there would remain the further significant question as to the standards for measuring such liability. The single, simple criterion adopted below was the fee simple value of the lands at the time of their cession. It may be questioned whether any such arithmetical approach—without regard to the need or numbers or other circumstances of the descendants claiming recovery for wrongs to their ancestors—properly appraises the considerations which impelled Congress "to grant payments from the public purse to needy descendants of exploited Indians." *Tee-Hit-Ton Indians* v. *United States, supra,* at 273-

274. But even assuming valuation of the land to be a sufficient guide in itself, we think it clearly erroneous to employ the value of a fee simple title the Indians never had or claimed rather than the value of the far more limited hunting and occupancy uses of which original Indian title was comprised. Cf. *Tee-Hit-Ton Indians* v. *United States, supra,* at 295 (dissenting opinion).

Undeniably, there would be a very substantial difference in the determined value depending upon the standard applied, as is well demonstrated by the Commission's reasoning (App. B, 98b, 100b) that 42 cents per acre paid for lands ceded in 1854 could "hardly be considered as compensation for only a quitclaim, rather than for recognized Indian title," and that the value of hunting rights was "little, if anything." Indian title with its imperfections does not compare with the fee simple. It cannot now be denied that Indian title is merely a right of temporary occupancy and that it may be extinguished by the sovereign at will without liability for compensation. *Tee-Hit-Ton Indians* v. *United States, supra,* at 285. And in purchasing Indian title, rather than asserting possession by the sword, the Government has paid to the Indians for their unimproved lands "as much as the privilege of hunting and taking game upon them is supposed to be worth." H. Rept. No. 227, 21st Cong., 1st sess., p. 6. Clearly, in determining whether the Government was acting fairly and honorably in its dealings and whether a purchase price was unconscionable, it would be unfair to charge the Gov-

ernment on the basis of the value of the fee simple title, which it possessed before its dealings with the Indians. Yet that is the rule established by the court below in this case to be applied in examining all such claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JULY, 1955.

APPENDIX A

COMPILATION OF AREA INVOLVED IN CLAIMS BASED UPON "ORIGINAL INDIAN TITLE" IN CASES PENDING UNDER INDIAN CLAIMS COMMISSION ACT AS OF JUNE 15, 1955

Docket Number	Claimant	Estimated Amount of Acreage Claimed
11	Otoe & Missouria	4,162,472
10	Pawnee	36,920,320
22	Apache	Not estimated
27	Delaware	372,500
27B	Delaware	1,947,368
27E	Delaware	1,450,000
29A	Hannahville	1,666,666
29B	Hannahville	7,876,620
29C	Hannahville	1,500,000
29D	Hannahville	349,440
29E	Hannahville	1,311,233
29F	Hannahville	1,116,000
29G	Hannahville	233,333
29I	Hannahville	Not estimated
29J	Hannahville	2,666,666
29K	Hannahville	1,833,333
13A	Chippewa	12,830,000
13E	Chippewa	691,110
13F	Chippewa	372,500
13G	Chippewa	1,800,000
13J	Chippewa	1,666,666
13K	Chippewa	2,119,666
13L	Chippewa	768,000
13M	Chippewa	1,833,333
15C	Pottawatomie	472,960
15D	Pottawatomie	7,521,960
15E	Pottawatomie	1,800,000
15F	Pottawatomie	335,000
15G	Pottawatomie	966,666
15H	Pottawatomie	1,086,866
15I	Pottawatomie	175,000
15J	Pottawatomie	5,852,960
15K	Pottawatomie	768,000
15L	Pottawatomie	2,119,666
15M	Pottawatomie	5,500,000
18A	Chippewa	11,000,000
18B	Chippewa	13,060,000
18C	Chippewa	36,000,000
18D	Chippewa	2,000,000
18E	Chippewa	7,000,000
18G	Chippewa	4,321,280
18I	Chippewa	8,000,000
18J	Chippewa	2,622,486
18K	Chippewa	1,242,855
18L	Chippewa	1,572,480
18M	Chippewa	1,684,152
18P	Chippewa	1,418,480
18Q	Chippewa	5,500,000
30	The Fort Sill Apaches	448,000
31 37	California	100,000,000

APPENDIX A—Continued

Docket Number	Claimant	Estimated Amount of Acreage Claimed
40C	Ottawa	1,900,000
40D	Ottawa	691,110
40E	Ottawa	372,500
40F	Ottawa	1,947,368
40H	Ottawa	1,666,666
40I	Ottawa	2,119,666
40J	Ottawa	768,000
40K	Ottawa	1,833,333
44	Uintah Ute Indians	2,240,000
45	Uintah Ute Indians	1,215,914
46	Nooksack	498,080
48	Warm Spring Apache	Not estimated
57	Saginaw Chippewa	4,321,280
58	Ottawa & Chippewa	13,734,000
59	Saginaw & Chippewa	2,620,800
61	Salish & Kootenai	14,756,031
64	Shawnee	2,888,068
66	Peoria	6,496,167
67	Miami	6,700,000
69	Navajo	Not estimated
71	Potawatomi	5,104,900
71A	Potawatomi	5,850,000
74	Sioux	66,436,717
73	Seminoles	39,032,940
81	Coeur d'Alene	3,400,000
80	Mission	Not estimated
83	Sac & Fox	15,000,000
87	Northern Paiute	Not estimated
88	Southern Paiute	Not estimated
89	Six Nations	Not estimated
90	Hualpai	Not estimated
91	Havasupai	Not estimated
93	Snoqualmie	Not estimated
94	Lower Pend D'Oreille	Not estimated
92	Skagit	Not estimated
97	Suiattle-Sauk	Not estimated
99	Peoria	2,616,921
100	Klamath & Modoc	12,050,000
98	Muckleshoot	487,029
110	Lummi	249,800
112	Kent Tribe of Schacthticoke	Not estimated
106	Osage	1,800,000
107	Osage	Not estimated
109	Duwamish	2,939,904
105	Osage	50,000,000
120	Wyandotte	16,000,000
113	Chippewa (Turtle Mt. Band)	12,500,000
124	Miami	9,066,600
125	Snohomish	224,000
128	Potawatomi	475,000
132	Suquamish	Not estimated
130	Miami	17,742,489
131	Miami	6,257,600
134	S'Klallam	Not estimated

APPENDIX A—Continued

Docket Number	Claimant	Estimated Amount of Acreage Claimed
135	Iowa	10,600,000
133	Ottawa	13,136,940
136	Pueblo de Cochiti	25,000
137	Pueblo de Zia	382,849
138	Iowa	11,000,000
144	Chippewa, Pillager Band	700,000
142	Sioux-Sisseton & Wahpeton	22,000,000
143	Sac & Fox	1,950,000
139	Wyandotte	1,572,480
140	Wyandotte	7,867,400
141	Wyandotte	3,360,000
148	Missions, Cabazon	680
146	Potawatomi	4,933,350
149	Missions, Twenty-Nine Palm	80
151	Seminole	35,111,040
161	Yakima	10,800,000
153	Iowa	11,000,000
154	Kootenai	14,756,031
155	Quileute	1,000,000
172	Yuchi (Euchee)	11,200,000
174	Pueblo de Pecos	764
176	Yokiah	Not estimated
171	Tee-Hit-Ton, Paul, Wm. L. Sr.	352,800
175	Nez Perce	15,480,000
180	Nez Perce	Not estimated
181	Conf. Tribe of Colville	Not estimated
182	Apache of Okla. (Ft. Sill)	Not estimated
186	Nez Perce	Not estimated
158	Sac & Fox	5,750,000
170	Pascagoula, Biloxi	12,000,000
187	Chitina Indians of Alaska	Not estimated
191	Chippewa, Little Shell	15,000,000
197	Nisqually, S'Homawish	Not estimated
193	Kickapoo Tribe of Kansas	2,000,000
194	Kickapoo Tribe of Kansas	3,000,000
196	Hopi	Not estimated
198	Warm Springs	7,040,000
214	San Juan	120,000
206	Squaxin	Not estimated
207	Stillagwamish	Not estimated
208	Steilacoom	Not estimated
215	Yana	Not estimated
203	Puyallop	Not estimated
211	Pueblo de Isleta	14,781
202	Delaware	1,200,000
216	Pottawatomi	1,274,880
217	Pottawatomi	4,160,000
199	Athabaska (Alaska)	38,400
200	Tatilek (Alaska)	Not estimated
210	Hopi Village	Not estimated
212	Wyandotte	119,140
218	Cowlitz	Not estimated
222	Palouse	Not estimated
224	Moses	Not estimated

APPENDIX A—Continued

Docket Number	Claimant	Estimated Amount of Acreage Claimed
225A	Omaha	783,365
226	Caddo	1,000,000
227	Pueblo of Luguna	Not estimated
229	Navajo	28,000,000
234	Chinook	Not estimated
231	Sac & Fox	1,250,000
266	Pueblo de Acoma	Not estimated
221	Chippewa Cree	Not estimated
245	Winnebago	4,000,000
264	Umatilla	12,160,000
228	Gila River Pima-Maricopa	Not estimated
244	Winnebago	2,600,000
243	Winnebago	2,300,000
246	Chippewa Red Lake Band & Pembina	9,000,000
282	Cherokee	2,349,446
295	Mohave	Not estimated
237	Upper Chehalis	Not estimated
240	Tillamook	Not estimated
233	Swinomish	Not estimated
261	Samish	Not estimated
262	Tulalip	Not estimated
263	Kikiallus	Not estimated
252	Miami	Not estimated
253	Miami	4,500,000
254	Miami	2,000,000
272	Creek	3,013,000
275	Creek	1,500,000
278	Tlingit & Haida	Not estimated
288	Washoe	6,249,588
289	Peoria	2,000,000
283	Colorado River	Not estimated
284	Gambell	1,205,000
285	Unalakleet	64,000
287	Nisgah	Not estimated
300	Stockbridge Munsee	Not estimated
301	Oneida	Not estimated
306	Potawatomi	2,000,000
307	Potawatomi	Not estimated
308	Potawatomi	700,000
309	Potawatomi	2,626,560
310	Potawatomi	900,000
311	Potawatomi	1,109,760
313	Peoria	11,300,000
314	Peoria	4,431,360
315	Kickapoo	13,000,000
319	Quecham	Not estimated
323	Ponca	7,000,000
326	Shoshone	41,624,270
327	Ute	3,776,876
329	Cheyenne Arapaho	43,000,000
348	Cheyenne Arapaho	Identical with No. 329
330	Southern Paiute	Not estimated
331	Spokane	4,000,000

APPENDIX A—Continued

Docket Number	Claimant	Estimated Amount of Acreage Claimed
332	Yankton Sioux	46,000,000
354	Pueblo of San Ildefonso	Not estimated
355	Pueblo of Santo Domingo	Not estimated
356	Pueblo of Santa Clara	50,000
357	Pueblo of Taos	Not estimated
358	Pueblo of Nambe	Not estimated
293	Swinomish	Not estimated
294	Skagit	Not estimated
350	Ft. Berthold	Not estimated
338	Delaware	17,000,000
337	Delaware	3,000,000
366	Bannack	Identical with No. 326
367	Bannack	Identical with No. 326
351	Chemehuevi	Not estimated
335	E. Shawnee	Not estimated
345	Papago	Not estimated
242	Quinaielt	1,110,000
296	Skokomish	Not estimated
321	Tuscarora	Not estimated
370	Palmer (Alaska)	Not estimated
347	Pitt River	6,400,000
333	Shasta (California)	10,000,000
344	Six Nations	7,657,654
359	Lower Sioux	Not estimated
360	Lower Sioux	Not estimated
361	Lower Sioux	Not estimated
362	Lower Sioux	Not estimated
368	Tonawanda (Seneca)	Not estimated
342	Seneca	6,841,687
343	Cayuga	64,000
341	Seneca Cayuga of Okla.	6,394,540
286	Shungnak (Alaska)	Not estimated
280	Creek Nation, McGee	8,816,960
236	Gila River Pima-Maricopa	Not estimated
369	Aleut (Alaska)	Not estimated
352	Aleut Community of St. Paul Island (Alaska)	Not estimated
340	Tuscarora	5,000
	Acres*	1,323,165,061

* This total for the 249 cases listed does not include the acreage in 79 cases as to which the acreage has been stated to be "not estimated" because the land descriptions in the petitions were too vague to permit an estimate without extensive research. It should also be noted that areas claimed by one tribe may, in many instances, overlap areas claimed by other tribes. Resolution of these problems of indefiniteness and overlap must, of course, await further litigation.

APPENDIX B

In the United States Court of Claims

Appeal No. 1-54

(Decided May 3, 1955)

OTOE AND MISSOURIA TRIBE OF INDIANS

v.

THE UNITED STATES

Messrs. Luther Bohanon and Marvin J. Sonosky for appellants. Mr. Bert Barefoot, Jr., and Messrs. Bohanon & Adams were on the briefs.

Mr. Ralph A. Barney, with whom was Mr. Assistant Attorney General Perry W. Morton, for appellee.

Messrs. Wilkinson, Boyden, Cragun & Barker, amici curiae. Messrs. Donald C. Gormley and John M. Murray were on the brief.

Mr. Jay H. Hoag and Messrs. Lathers, Hoag & Edwards, for Red Lake Band of Chippewa Indians and others, amici curiae.

ON APPEALS FROM THE INDIAN CLAIMS COMMISSION AND ON INDIAN APPELLANTS' MOTION TO VACATE THE COMMISSION'S JUDGMENT ON THE FIRST CAUSE OF ACTION AND TO REMAND

LITTLETON, *Judge,* delivered the opinion of the court:

These are appeals from decisions by the Indian Claims Commission, Docket No. 11. See 2 Ind. Cl.

Com. 335;[1] *id.* p. 500.[2] The Indians have appealed from the Commission's final determinations in the first, second, fourth, fifth, sixth, and seventh causes of action.[3] The Government has appealed from the Commission's final determinations in the third and fourth causes of action and from the Commission's final determination on offsets.

Subsequent to oral argument on appeal, the Indian appellants moved to vacate the Commission's judgment on the first cause of action and to remand that cause for further proceedings before the Commission in order to permit the Commission to act on a motion there pending concerning this claim. The grounds for the motion herein are changes supervening since the taking of the appeal, and newly discovered evidence. The Government objected to the granting of the motion on the ground, among others, that a decision by this court upholding the Government's contention that no claim involving so-called Indian title land is cognizable under section 2 of the Indian Claims Commission Act, would render useless a remand of the first claim which concerns such land. Accordingly, we defer action on Indian appellant's motion and shall decide it later in this opinion.

We shall first discuss and decide the Government's overall contention that Congress did not, in enacting the Indian Claims Commission Act, create

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[1] Findings and decision on liability and damages, dated March 31, 1953.

[2] Findings and decision on offsets, dated December 11, 1953.

[3] The eighth and ninth causes of action requested an accounting of all financial transactions between the parties. These matters were dealt with in a separate hearing on offsets.

any new causes of action, but merely provided a forum in which Indian claimants could sue the United States on only those claims concerning which the United States had already consented to be sued by non-Indians.

As pointed out by defendant, the function of recognizing liability in the United States for claims that have no legal or equitable basis under existing law is a political and not a judicial function. We think it is quite clear from the face of the Indian Claims Commission Act that in its passage Congress was, to a certain extent, exercising its political function of creating certain new causes of action and recognizing liability in the United States, if the facts warranted, in connection with such causes. In fact, the Act clearly creates causes of action and permits suit thereon which would not have been possible, and are not possible, as far as we know, between private individuals. In addition, Congress was providing a forum in which these causes of action might be sued on, and also in which the Indians might sue the United States on causes of action available to non-Indians.

Clauses (1) and (2) and portions of clause (3) of section 2 merely provide a forum in which Indians may sue the United States in the same manner as non-Indians, except that Congress expressly waived the defenses of the statute of limitations and laches.[4]

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[4] Claims arising subsequent to the passage of the Act in 1946 are provided for in section 24 (see *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272) and are subject to all the usual defenses.

Clauses (1) and (2) provide as follows:

> * * * (1) claims in law or equity arising under the Constitution, laws, treaties of the United States and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, *with respect to which the claimant would have been entitled to sue in a court of the United States if the United States were subject to suit;* * * * [Italics supplied.]

In general, these clauses extend to Indian claimants the benefits of the Tucker Act and the Tort Claims Act.

Clause (3) provides:

> * * * (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; * * *

Suits for the reformation or revision of *contracts* for fraud, duress, unconscionable consideration and for *mutual* mistake of *fact* are claims on which the claimant might have brought suit in the Federal courts against the United States if the Government were subject to suit. Accordingly, to this extent, clause (3) merely provides a forum for such suits by Indian claimants.[5] On the other hand, contracts may not be reformed for mutual mistake of *law*, or for *unilateral* mistake of law or fact, as pro-

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[5] It would seem that such claims could have been brought under clause (2).

vided in this clause. Neither may Federal courts entertain claims requiring the revision of treaties.[6] In these instances, certainly, Congress was creating new causes of action and also was providing a forum in which they might be litigated.

Clause (5) provides:[7]

> * * * (5) claims based upon fair and honorable dealings *that are not recognized by any existing rule of law or equity.* [Italics supplied.]

That the above clause creates a new cause of action against the United States seems too obvious for comment.

In the first four causes of action the Indian appellants sue on claims which would result if certain treaties were revised for unconscionable consideration under clause (3) of section 2 of the Indian Claims Commission Act, or which would result if the Government's actions did not measure up to the standard of fair and honorable dealings, on the part of the United States, under clause (5). All of the treaties and dealings involved in these four claims concern land held by the Indian appellants by so-called Indian title, i.e., exclusive possession, occupancy, and use from time immemorial. It is the Government's position that even if Congress did create new causes of action based on revision of treaties for unconscionable consideration, or on lack of fair and honorable dealings by the United States, there is nothing in the Act which indicates a Congressional intent to *create* a cause of action in the claimant, or to admit the existence of a

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[6] *Otoe and Missouria Indians* v. *United States*, 52 C. Cls. 424; *Osage Tribe of Indians* v. *United States*, 66 C. Cls. 64.

[7] We shall discuss clause (4) later in this opinion.

liability in the Government, where the treaty sought to be revised, or the dealings claimed to be unfair, involve land held by the Indian claimants by aboriginal use and occupancy title (Indian title) rather than reservation or treaty title.

This phase of the appeal has been extensively and painstakingly briefed by the parties and by others who have filed helpful briefs *amici curiae*. Following the recent decision of the Supreme Court affirming this court's decision in the case of *Tee-Hit-Ton Indians* v. *United States*,[8] additional briefs were filed concerning the possible applicability of the decision in that case to this issue in the present appeal.

In the *Tee-Hit-Ton* case the Supreme Court held that "Indian title" interest in land does not give rise in the Indians claiming such title to any rights against the United States under the Constitution or under section 24 of the Indian Claims Commission Act[9] (now codified as 28 U.S.C. § 1505). Noth-

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[8] 128 C. Cls. 82, affirmed February 7, 1955, 348 U.S. 272.

[9] Section 24 of the Indian Claims Commission Act (60 Stat. 1049) provides in part as follows:

> "The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, band, or other identifiable group of American Indians * * * whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group. In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity,

ing in the opinion in that case purports to speak on the question involved in the present controversy, i.e., whether, in enacting section 2 (3) of the Indian Claims Commission Act and creating liability in the United States on claims which would result if treaties, etc., between the Indian claimant and the United States were revised on the enumerated grounds, Congress intended to include treaties dealing with Indian-title land; or whether, in enacting clause (5) of section 2, Congress intended to create liability in the United States where it could be shown that the Government acted less than fairly and honorably in its dealings with the Indians in connection with treaties concerning their Indian-title land. While the Supreme Court's decision is not entirely silent on these questions, it is obvious that it did not intend to decide these questions. We shall discuss such references later in this opinion.

In support of their conflicting contentions regarding the legislative intent, both parties have pointed to the language of the statute, its legislative history, special jurisdictional acts to some extent in *pari materia*, and to various standard rules of statutory interpretation and construction.

The parties have made numerous contentions based on various so-called rules of statutory interpretation and construction: that because the Indian Claims Commission Act is a special jurisdictional act giving consent to sue the United

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and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 USC sec. 250), as amended: * * *"

States, it must be strictly construed; that because the Act is essentially remedial it must be liberally construed in favor of the class it was intended to benefit and in the light of the evils it was intended to correct; that the Act is unambiguous on its face and that therefore resort to legislative history to determine its meaning is improper; that although the meaning of the words used may be plain, courts may still look to the legislative history to determine whether giving the words their natural significance leads to unreasonable results plainly at variance with the policy of the legislation as a whole, or to determine whether a certain word or phrase has been employed with a more limited or different meaning than might be attributed to it in common practice; that the failure of Congress to include the specific words, i.e., "Indian title land," requires the conclusion that Congress intended to exclude such words; that unless the language of the statute necessarily excludes certain matters, it may be construed to cover such matters if they come within the spirit or reason of the law, particularly where such coverage does not give the statute a meaning inconsistent with the language used but rather serves to accomplish the purpose of the law and is in harmony with the other provisions of the statute.

Rules of statutory interpretation and construction are not legal maxims or ends in themselves, but are rather aids in discovering the meaning to be attributed to the language employed by the legislature. The application of any particular rule may well be affected by other rules in order to avoid absurd results. Whether a statute is to be

construed strictly or liberally depends on which construction will make the legislative intent and purpose effective. A liberal construction will not justify an extension of the scope of the statute beyond the obvious contemplation of the legislature, even though the statute be purely remedial in nature and the construction proposed will produce a most desirable result. On the other hand, strict construction will not be applied to defeat the clear intention of the legislature or to produce an absurd result, unless absolutely unavoidable.

The Indian Claims Commission Act is both remedial legislation and special legislation. It broadens the Government's consent to suit and as such is in derogation of its sovereignty. It confers special privileges upon the Indian claimants apart from the rest of the community, and to some extent is in derogation of the common law. This was, we think, because of the peculiar nature of the dealings between the Government and Indians from very early times. On the other hand, it remedies defects in the common law and in pre-existing statutory law as those laws affected Indians, and it was designed to correct certain evils of long standing and well known to Congress. Fortunately, under these circumstances, rules of interpretation and construction are subordinate to the principle that the object of all construction and interpretation is the just and reasonable operation of the particular statute, and accordingly it should be possible to construe the statute liberally to affect its remedial purpose and intent, and strictly to limit undue abrogation of fundamental rights

or to prevent undue extension of extraordinary remedies.

The Government appellant lays particular stress on the fact that nowhere in clauses (3) and (5) is the expression "Indian title land" employed, and urges that the omission of this expression should not be supplied by the court. Since all mention of "land" is omitted in those clauses, it would seem that a court would be as little justified in implying that Congress meant to include "reservation title land" or "fee simple title land" as it would "Indian title land." But it manifestly did intend to include land under some title since it is common knowledge that Indian treaties dealt primarily with Indian *land* and usually provided for cessions of such land held both by "Indian title" and "Reservation title" to the United States. Sometimes the land being ceded was land to which the Indians had aboriginal use and occupancy title which, as a matter of policy, the Government preferred to extinguish by formal treaty rather than by arbitrary action or by appropriation. Sometimes the land was held by reservation or treaty title. At other times the treaty in question covered land held by both types of ownership. Since the language of clauses (3) and (5) does not, in so many words, state whether Congress intended to permit the adjudication of claims thereunder where the land involved was Indian title land, we must endeavor to discover by means of both intrinsic and extrinsic aids to statutory interpretation, what Congress did intend.

One step in the discovery of legislative meaning or intent is the ascertainment of the legislative

purpose, i.e., the reasons which prompted the enactment of the law. The purpose of the legislature may well tend to reveal the meaning of the language used by the lawmakers since we assume that the legislators sought to use language which would carry out their purpose rather than to defeat it. In seeking to ascertain the legislative purpose, it is proper to look at the circumstances existing at the time of the enactment of the statute, to the necessity for the law, the evils intended to be cured by it, to the intended remedy, and to the law as it existed prior to such enactment.

From the publication of the so-called Merriam Report [10] in 1928 until the Indian Claims Commission Act of 1946 was enacted, Congress was almost constantly engaged in considering various proposals designed to bring about a settlement of outstanding Indian claims on a fair and equitable basis and in as expeditious a manner as possible. It was generally agreed that settlement of Indian claims by means of suits under numerous special jurisdictional acts was both cumbersome and unsatisfactory. As pointed out by the Secretary of Interior in a letter introduced in the record of Senate Hearings on S. 2731 (June 1935, 74th Cong., 1st Sess.) to create an Indian Claims Commission, most jurisdictional acts were in fact inequitable, and recoveries by the Indians in the Court of Claims on legal and equitable claims under such acts were infrequent, with resulting justifiable dissatisfaction by the tribes and their

[10] The Problem of Indian Administration prepared by the Institute for Government Research at the request of the Secretary of the Interior. See Chapter XIII.

later return to Congress for further redress. [Hearings p. 4.]

In general the bills introduced in both houses were of two kinds. One type of bill merely extended the general jurisdiction of the Court of Claims to cover suits by Indians. Under these bills, only claims of a legal or equitable nature could be brought against the United States.[11] The other type of bill provided for the settlement of

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[11] H. R. 7963, 71st Cong., 2d Sess., 1930, to create a separate court of claims for Indians which would have jurisdiction to hear and determine claims of Indians under the Constitution, laws or treaties, regulations of an executive department, contract express or implied with the Government, and for damages, liquidated or unliquidated in cases not sounding in tort, "in respect of which claim the tribe would be entitled to redress against the United States" in law, equity or admiralty courts, if the United States were suable. The defense of the statute of limitations was waived.

S. 2164, 76th Cong., 1st Sess., 1939, to amend the Judicial Code in respect to the jurisdiction of the Court of Claims in Indian cases. Sec. 145C of this act provided that until otherwise expressly provided by Congress, no jurisdictional Act authorizing suit by Indians against the United States *theretofore* or *thereafter* filed, should be construed by the court, by reason of its passage, general language, or the legislative or administrative history thereof, to pre-judge the nature or merits of the claim in any respect, or as a recognition of liability of any kind, or as a determination in any degree of the existence or nature of an alleged act on the part of the United States, upon which the claim of liability is predicated; that instead, all such actions should be determined in accordance with established rules applicable to non-Indians in Federal courts.

S. 3083, 76th Cong., 3d Sess., 1940, was almost identical with S. 2164 above. Extensive hearings were held on this bill which was objected to by the Department of the Interior because it would render a nullity those jurisdictional acts already passed which were intended to afford Indians redress in the Court of Claims for wrongs of a *political* nature.

legal and equitable claims and also for the settlement of extra-legal or moral claims having no basis in law or equity.[12]

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[12] S. 3444 (73rd Cong. 2d Sess., 1934), and S. 1465 (74th Cong. 1st Sess., 1935), provided for the creating of an *Indian Claims Court* for the immediate *settlement by negotiation of* all Indian claims then or thereafter pending before the Court of Claims under special jurisdictional acts. The act provided that the settlements were not to be limited or restricted by technical terms contained in any special jurisdictional act under which the claims were pending, and that the settlement should not be limited by any technical defenses. The Indian Claims Court was to have jurisdiction to reconsider any judgment of the Court of Claims entered within twelve years of the passage of the act and if the Indian Court found that such judgment was not based on a full, fair and complete adjudication of the merits but was based on technical grounds, then the Indian Claims Court might recommend a sum in complete settlement of any claims closed by such judgments. The recommendations of the Court were to be transmitted to Congress for appropriations. Any settlement of other claims reached by the Indian Claims Court were to be referred to the Court of Claims which would render judgments thereon.

H. R. 6655 (74th Cong. 1st Sess., 1935), S. 2731 (74th Cong., 1st Sess., 1935), H. R. 7837 (74th Cong., 1st Sess., 1935), S. 1902 (75th Cong., 1st Sess., 1937), H. R. 5817, (75th Cong., 1st Sess., 1937), and S. 4206 (76th Cong., 3d Sess., 1940), all provided for the establishment of an *Indian Claims Commission* to *investigate* and to determine all facts relative to the following types of claims (1) claims arising under the Constitution, laws, treaties, etc., [this claim was omitted from some of the bills] (2) contract and tort claims, (3) claims arising from the breach of duty by a Government agent while purporting to act in the name of the United States, (4) "claims under *all* treaties heretofore negotiated between the claimant and the United States *but not formally ratified* or executed by all of the parties thereto" (hereinafter referred to as the "unratified treaties" clause), (5) claims based on *fair and honorable dealings*, (6) claims which would arise if treaties, agreements and contracts between the claimant and the United States were revised on the ground of fraud, duress, *mutual or unilateral mistake whether of law or fact.* The Commission

Beginning with a bill drafted and submitted to the Senate Committee on Indian Affairs during the course of hearings before a subcommittee, 70th and 71st Cong., by the Solicitor of the Depart-

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was to make its reports and recommendations to Congress either for direct appropriations or for the passage of special jurisdictional acts referring the claims to the Court of Claims. [Italics supplied]

S. 4234 (76th Cong., 3d Sess., 1940), S. 4349 (76th Cong., 3d Sess., 1940), S. 1111 (77th Cong., 1st Sess., 1941), S. 4339 (77th Cong., 1st Sess., 1941), and H. R. 4693 (78th Cong., 2d Sess., 1944), all provided for the establishment of an Indian Claims Commission *to hear and determine* all claims against the United States on behalf of the Indians. The types of claims enumerated were the precise ones provided for in the bills discussed in the preceding paragraph (including claims founded on the Constitution, laws, treaties, and Executive orders of the President). The bills varied somewhat with respect to the effect of the Commission's final determinations. The Justice Department objected to the passage of this type of bill because it gave the Commission the power to hear and determine claims based on "extra-legal" or moral grounds, a power Congress usually retains for itself.

H. R. 5569, (78th Cong., 2d Sess., 1944), and H. R. 1198 and H. R. 1341 (79th Cong., 1st Sess., 1945) all provided for the establishment of an Indian Claims Commission to hear and determine claims against the United States on behalf of the Indians. The claims enumerated in these bills differed slightly from those enumerated in the bills discussed in the preceding paragraph. The "revision of treaties" clause contained only the grounds of fraud, duress and mutual mistake; unilateral mistake of law or fact was omitted. The "fair and honorable dealings" language was not used and in its place there appeared a clause reading:

> "claims of whatever nature which morally exist though not recoverable by law."

These bills contained no clause referring to "unratified treaty" claims.

On June 11, 1945, the Department of the Interior submitted a draft containing its proposed amendments to H. R. 1198.

ment of Interior, this latter type of bill usually contained provisions which permitted consideration of non-legal or moral claims, including claims which would result if treaties, contracts and agree-

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These amendments called for the reinsertion of the "unratified treaty" clause which had appeared in numerous bills in the past; they called for the insertion of grounds appearing in previous bills in the "revision of treaties" clause, i.e., mutual and unilateral mistake of law and fact; and they called for the reinsertion of the old "fair and honorable dealings" language in place of the language "claims of whatever nature which morally exist." On June 14, 1945, the Department of the Interior submitted another draft of H. R. 1198 with additional amendments which included: (1) the substitution of the following language for the old "unratified treaty" clause language:

> "claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant."

(2) the addition of "unconscionable consideration" as a ground for revision of treaties.

Later in the hearings, H. R. 4497 (79th Cong., 1st Sess., 1945) was substituted by the House Committee for H. R. 1198 and H. R. 1341, and it included all the last discussed amendments. On July 13, 1946, the Senate Committee on Indian Affairs considered H. R. 4497 (79th Cong., 2d Sess., 1946), with amendments apparently suggested by the Department of Justice. These amendments eliminated the clause concerning "unratified treaties" and lands owned or occupied by the claimants; there was also omitted the "revision of treaties" clause and the clause relating to breaches of duty by Government agents. The bill as amended was passed by the Senate. On disagreement by the House, the bill was referred to a conference of members of both Houses. As a result of this conference, the two Houses agreed to reinsert the "revision of treaties" clause and the clause relating to the taking of land owned or occupied by the claimant, whether by treaty or otherwise. The clause relating to a Government agent's breach of duty was not reinserted. This bill was finally enacted into law.

ments between the Indians and the United States were revised on the basis of fraud, duress, mutual or unilateral mistake of law or fact (hereinafter sometimes referred to as the "revision of treaties" clause); claims based on the breach of duty of a Government agent acting within the apparent [13] scope of his authority; claims arising under treaties therefore negotiated between the claimant and the United States but not formally ratified or executed by all the parties thereto (hereinafter sometimes referred to as the "unratified treaties" clause), and claims based on fair and honorable dealings not cognizable in law or equity.

The first group of bills provided for the settlement by negotiation of all pending claims. The next group of bills provided for the investigation of all claims and reports and recommendations thereon to Congress. The last group of bills provided for the hearing and final *determination* of the same types of claims. The claims provided for in the earliest bills differed little from those included in the various clauses of section 2 of the bill finally enacted into law.

A study of the numerous bills relating to the proposed final settlement of Indian claims, the accompanying House and Senate hearings, the House and Senate Committee reports, and the debates on the floors of both Houses, reveals that in enacting the 1946 Indian Claims Commission Act, Congress had certain well-defined purposes in mind. Congress wished to settle all meritorious claims of

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[13] The United States is not ordinarily liable for the unauthorized acts of its agents. *Gibbons* v. *United States*, 8 Wall. 269, *Whiteside et al.* v. *United States*, 93 U.S. 247.

long standing of Indian tribes and bands whether those claims were of a legal or equitable nature which would have been cognizable by a court of the United States had the United States been subject to suit and the Indians able to sue, or whether those claims were of a purely moral nature *not* cognizable in courts of the United States under any existing rules of law or equity. Congress was well aware of the fact that before the latter type of claim could be litigated and a judgment secured, it would be necessary for Congress to take the necessary political action of creating a cause of action and recognizing liability in the Government for the wrong implicit in the cause if facts sufficient to establish the cause provided for were presented by the Indian claimant. Consideration of language which would do precisely that was begun in 1928 and culminated in the enactment of clauses (3), (4) and (5) of the Indian Claims Commission Act in 1946. Efforts to prevent the enactment of a bill which would give the Indian Claims Commission jurisdiction to adjudicate and award judgment on claims having no basis in existing rules of law or equity, met with ultimate failure [14] and the purpose of the majority of the legislators to permit the adjudication of such claims is manifest in the clear language of section 2 of the act as passed.

We next consider the narrower problem of determining whether or not Congress intended to in-

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[14] See footnote 11 supra, in connection with S. 2164, 76th Cong., 1st Sess., 1939, S. 3083, 76th Cong., 3d Sess., 1940, and the Senate amendments to H. R. 4497 (79th Cong., 1st Sess., 1946) discussed in footnote 12, above.

clude in clauses (3) and (5) of section 2 of the Act, claims concerning alleged wrongs to Indian claimants in connection with land held by them under Indian title rather than under fee simple or reservation title. As pointed out earlier in this opinion, the word "land" is not mentioned in either clause, and yet no one suggests that because a particular treaty or course of dealings dealt with *land* the treaty is not subject to revision under clause (3), or the dealings cannot be scrutinized under the fair and honorable dealings criteria of clause (5). Government appellant does say, however, that when Congress used the term "treaties" in clause (3) it did not mean to include *all* treaties, but only certain ones, i.e., treaties relating to land held by the claimants under fee simple or reservation title; and that when Congress used the word "dealings" in clause (5), it did not mean all dealings, but rather it meant to exclude from consideration any dealings relative to the claimant's Indian title land. Indians can obtain a reservation title by treaty, statute or agreement.

Since both "treaties" and "dealings" between the Government and the Indians covered numerous subjects including land, it may be said that those words as used in clauses (3) and (5) are general terms. It is true that a court in interpreting a provision in a statute may imply an exception to general terms used therein, but it will do so only where to apply the general term literally would lead to absurd results, contrary to the manifest Congressional purpose as revealed by the statute as a whole and as confirmed by its legislative history. Cf. *Sorrells* v. *United States,* 287 U.S. 435;

Holy Trinity Church v. *United States,* 143 U.S. 457.

In the absence of legislative direction to do so, Federal courts cannot consider claims relative to Indian title land. Congress must first create a cause of action and recognize liability in the Government on it, or the court is powerless, under the law as it exists, to adjudicate a claim concerning Indian title land and render judgment thereon in favor of the claimant.[15] In providing for the adjudication of claims which would arise from the revision of treaties or on the basis of fair and honorable dealings, however, Congress *was* creating causes of action and admitting a liability in the Government on such claims. The question is then, do these newly created causes of action extend to claims falling within their general terms including claims based on property rights in the Indians that are not compensable or justiciable under ordinary rules of law or equity.

In the instant case the literal meaning of clauses (3) and (5) does not require the exception urged by Government appellant. Giving the word "treaties" used in clause (3) its natural significance would result in our finding that Congress intended that *all* treaties were to be included regardless of whether those treaties dealt with Indian title or reservation title land, or, in fact, with no land at all. Nothing in the language of clause (5) indicates a Congressional intent to exclude from its coverage "dealings" relating to Indian title land of the claimant.

The court should give the statute the plain mean-

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[15] *The Tee-Hit-Ton Indians* v. *United States, supra.*

ing indicated by its language unless that meaning is clearly at variance with the legislative purpose as manifested by the whole act and confirmed by the legislative history, in which latter event the court would be justified in following the purpose rather than the literal meaning of the portions of the statute under consideration. *Chatwin* v. *United States,* 326 U.S. 455, 464; *United States et al.* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 543.

Having concluded that a literal reading of clauses (3) and (5) requires the inclusion of claims relating to Indian title land, we next consider whether that interpretation is consistent with other provisions in the statute in the light of the language used in those other provisions, and also in the light of the legislative purpose motivating the passage of the act as a whole.

The word "land" is used only once in section 2 and that is in clause (4) which provides as follows:

> * * * claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, *of lands owned or occupied by the claimant* without the payment for such lands of compensation agreed to by the claimant; * * * [Italics supplied.]

Clause (4) not only mentions land specifically, but it characterizes the kinds of property interests intended to be included as (1) land owned, and (2) land occupied. The legislative history of the act is replete with evidence that Congress was acutely aware of the fact that Indians held land in two general ways: (1) by virtue of aboriginal use and

occupancy from time immemorial, i.e., by Indian title, and (2) by reservation or treaty title, sometimes known as "recognized" title. Congress was also well aware of the fact that "Indian title" created in the holders of such title no legal rights against the sovereign, and that its extinguishment by the sovereign through solemn treaty for a consideration, was the result of a long standing policy rather than because of any legal obligation in the sovereign to do so. Both from the language of clause (4) and its legislative history which we shall discuss later, we are of the opinion that Congress intended that Indian claimants should have a cause of action and should be entitled to recover the value of the Indian title lands which had been taken by the Government without the payment of compensation therefor, whether the Government acquired that land by ratified treaty of cession, or whether the land was taken without the formality of a treaty, even an unratified one.

If clause (4) permits Indian claimants to recover for the uncompensated taking (deprivation) by treaty or otherwise of a property right which in itself created no legal right in the owner against the Government, it would seem reasonable to conclude that Congress also intended that the same property right ceded under a ratified treaty of cession for a grossly inadequate consideration, would give rise to a cause of action under clause (3); and also, that where the Government's dealings with Indians concerning that same property right were less than fair and honorable, the Indians should have a claim under clause (5). A study of the legislative history of the Act as a

whole and of those three clauses in particular, persuades us that Congress did so intend.

In June 1935, during the course of hearings on S. 2731 before the Senate Committee on Indian Affairs, the Assistant Solicitor of the Department of the Interior testified as follows:

> Congress does not appear to learn that a great many claims cannot be settled by the Court of Claims but only by political action, in spite of the fact that all the many claims which sought relief from fraud, duress, or mistake of fact, and which have been sent to the Court of Claims were dismissed for want of jurisdiction. [Hearings, pp. 10, 11.]

As examples of the type of claim that had been rejected by the court as beyond its power to adjudicate, the Solicitor cited, among others, *Otoe and Missouria Indians* v. *United States, supra,* which involved claims based on the payment of unconscionable consideration under a treaty of cession of land held by the Indians by *Indian title,* and *Sisseton and Wahpeton Indians* v. *United States,* 58 C. Cls. 302 (1923), (affirmed 277 U.S. 425), involving a claim based on mistake and misrepresentation as to the acreage of *Indian title* land ceded to the United States by a ratified treaty of cession. The other cases mentioned by the Solicitor involved claims requiring revision of treaties covering reservation title land.

The extra-legal claims over which the Commission was to be given jurisdiction in S. 2731 included (1) claims arising from breach of duty of a government agent acting within the apparent scope of his authority, (2) claims based on *unratified* treaties which had been negotiated between

the United States and the Indian claimants, (3) claims based on fair and honorable dealings, and (4) claims which would result if treaties, etc., were revised for fraud, duress, or mutual or unilateral mistake of law or fact.

H. R. 7837 (74th Cong., 1st Sess., 1935) was an almost identical bill considered by the House Committee on Indian Affairs. The Commissioner of the Bureau of Indian Affairs testified in favor of the bill and made the following statement in connection with the problems which the bill was designed to solve:

> Ever since the beginning of the history of our Government in Indian Affairs the Government has been entering into treaties with Indian tribes and having these treaties, either by agreement or unilateral action, and in later years supplementing them with agreements. Again, it has been acting as the guardian of the Indians in the absence of treaties. It has been recognizing the Indian title to areas of land, extinguishing the Indian claim of title to other areas, and having recognized title repeatedly the Government has changed its mind and altered and diminished them. * * *
>
> Now, out of this total of the past record, extending down to this day, there have grown up innumerable grievances and claims, in some instances resting upon grounds which are definitely legal or ethical (*sic*) and therefore can be settled in the Court of Claims, that is if they can get passed a jurisdictional act and if the act is drafted with a knowledge of the necessary facts then the case may be settled in the Court of Claims equitably.
>
> A considerable number of the claims and grievances do not grow out of legal facts but essentially out of the moral parts of the rec-

> ord. There are a great many valid Indian claims, valid humanely and morally, but such have no basis in law. * * * [House hearings, pp. 5 and 6.]

In 1937 Congress was considering S. 1902 (75th Cong., 1st Sess.) which was almost identical with S. 2731 and H. R. 7837. At page 3220 of the Congressional Record—Senate, April 7, 1937, Senator Thomas made the following statement concerning S. 1902:

> The reason for the bill is the long delay in the consideration of Indian claims before the Court of Claims. In 1927 a measure was enacted giving the California Indians the right to go into court and present their claims. Their case has been pending since 1927. The case was filed by the Attorney General of California, but it is not being prosecuted; nothing is being done. *It is to help Indians of that class that the measure before us is being urged.* * * * [Italics supplied.]

On June 23, 1937, the same bill was considered by the House. Speaking in favor of the bill, Representative Dimond stated:

> And the case of the California Indians is only an example of what has gone on and is going on all over the country with respect to many of the Indian citizens. Some other measure might be proposed which would work out to better advantage both for the Government and for the Indians, but no such measure is now before us and we all know the difficulties that would be encountered in drafting such a bill and having the same presented and considered. [Congressional Record—House, p. 6251.]

The claims of the California Indians were well known to the Congress. The Government had, in the last century, negotiated some eighteen treaties with certain of those Indians pursuant to which the Indians agreed to cede to the United States lands claimed by them under Indian title. In reliance on those treaties, the Indians left their land. The treaties were never ratified and the Indians were paid nothing for the land involved. Other California Indians, not parties to the treaties, were deprived of their land which was taken by the Government without the payment of any compensation. As indicated above, Congress supposed that the claims of these Indians could be settled under the provisions of the bills then under consideration. The hearings and debates do not mention, in the earlier years, under precisely which provision of the bills those claims could be considered, but the claims of the unratified treaty Indians would seem to fall within the meaning of the following clause which appeared in nearly every bill introduced to settle extra-legal claims from 1935 through 1944:[16]

> * * * claims under all treaties heretofore negotiated between the claimant and the United States but not formally ratified or executed by all of the parties thereto; * * *

In 1940 there was under consideration S. 3083 (76th Cong., 3d Sess.) to amend the jurisdiction

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[16] H. R. 6655 (74th Cong., 1st Sess., 1935); S. 2731 (74th Cong., 1st Sess., 1935); H. R. 7837 (74th Cong., 1st Sess., 1935); S. 1902 (75th Cong., 1st Sess., 1937); H. R. 5817 (75th Cong., 1st Sess., 1937); S. 4206 (76th Cong., 3d Sess., 1940); S. 4234 (76th Cong., 3d Sess., 1940); S. 4349 (76th Cong., 3d Sess., 1940); S. 1111 (77th Cong., 1st Sess., 1941); S. 4339 (77th Cong., 1st Sess., 1941); H. R. 4693 (78th Cong., 2d Sess., 1944).

of the Court of Claims to permit Indians to sue therein. It contained a provision that no jurisdictional act theretofore or thereafter passed should be construed by the court to prejudge the nature or merits of a claim in any respect, or to amount to a recognition of liability of any kind, nature or character, in the Government. The Department of Justice explained that this provision was designed to assure that no special jurisdictional act in behalf of Indians could be held by the court to create a right but only to provide a forum for rights recognized under existing rules of law and equity. The Department of the Interior seriously objected to this provision and in a report explaining its position it made the following statement:

> * * * it is appropriate and essential in some types of claims for Congress to recognize a liability by the passage of a jurisdictional act. These types of claims are not those based on the violation of any law, treaty, or agreement of the United States but based upon that sort of injury which the Court of Claims has described as political rather than judicial in nature. Among such claims are (a) Claims based on the taking without compensation of the *aboriginal right of use and occupancy of land,* the ownership of which by the Indians was never formally recognized by the Government * * *. [Italics supplied.] [Senate Hearings p. 22]

The legislative history of the California jurisdictional bill indicates that Congress was repeatedly advised of the lack of a strictly legal or equitable basis for the claims and that recovery for the claims, morally compelling, must depend on the exercise by Congress of its political function of recognizing liability for such claims. [Senate Hearings p. 23]

There was general agreement at the hearings that S. 3083 would prevent the Court of Claims from considering any claim arising out of an Indian title interest in land, or any other so-called extra-legal or moral claim, and that its passage would make a nullity of any jurisdictional act then pending or later enacted which permitted suits on such moral claims. The bill was not passed.

In the summer of 1940, Senator Thomas introduced two bills providing for the creation of an Indian Claims Commission (S. 4234 and S. 4349, 76th Cong., 3d Sess.), to hear and determine claims of the same type as those specified in numerous similar bills considered from 1935 up to that time. In 1941, another almost identical bill was introduced—S. 1111. This bill provided that the Commission's final determination should, when reported to Congress, have the effect of a final judgment of the Court of Claims and be paid in like manner. The Department of Justice objected to the passage of the bill for the following reasons, among others:

> The provision in question might therefore have the effect of making the Commission not a fact-finding body authorized to report its conclusions to the Congress, but virtually a court with the power to determine claims based upon extra legal and moral grounds. Such a result might have the effect of a surrender by the Congress of its very necessary prerogative to sift and control this unusual type of claim against the Government. [Letter from Acting Attorney General Francis Biddle, June 12, 1941, appearing at page 6 of

Report No. 909 of the Senate Committee on Indian Affairs to accompany S. 1111.] [17]

In the 78th and 79th Congresses (1944 and 1945), three additional bills were introduced in the House (H.R. 5569, 78th Cong., 2d Sess., 1944, H.R. 1198 and H.R. 1341, 79th Cong., 1st Sess., 1945). These bills differed from previous bills in that the "revision of treaties" clause contained only the grounds of fraud, duress, and mutual mistake and omitted unilateral mistake and mistakes

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[17] The Department of Justice had not objected seriously to earlier bills which had merely authorized the Commission (1) to settle by negotiation or (2) to investigate and report to Congress with recommendations, claims of an extra-legal or moral nature, including, among others, claims involving Indian title land. It did object, however, to any bill which would create causes of action on such claims, admit liability in the Government thereon, and give to the Commission or Court the power to render money judgments thereon. In the early years, Congress had no idea of authorizing a Commission to award judgments on purely moral claims. Its purpose was to have the Commission investigate those claims, make findings thereon and report to Congress its recommendations for the disposition of such claims. It was thought that such an arrangement would expedite the handling of Indian claims and would provide a way for more equitable and generous settlement of long-standing grievances on the part of the Indians than did the old system of procuring the passage of special jurisdictional acts. It was finally decided, however, that the most satisfactory and expeditious manner of settling both legal and extra-legal claims of the Indians was to give a commission the authority to hear and determine such claims and to render judgments thereon which would be final and would be paid in the same manner as are judgments of the Court of Claims. It was felt that this would relieve Congress of the burden of studying the findings and recommendations of a mere fact-finding commission and of later passing legislation appropriating money to pay claims deemed meritorous, or legislation referring others involving law questions to the Court of Claims.

of law. The usual "fair and honorable dealings" language was also omitted and in its place there appeared a clause reading: "Claims of whatever nature which morally exist though not recoverable by law." The bills contained no clause relating to claims under "unratified treaties."

In March 1945, the House Committee on Indian Affairs held hearings on H.R. 1198. The Assistant Commissioner of the Bureau of Indian Affairs testified in favor of the bill. He stated that most of the claims that would be brought under the bill would involve the failure of the Government to live up to its obligations incurred under treaties, and the failure of the Government to protect lands "reserved by the Indians and recognized by treaty." He then stated that another sort of claim was included in the bill's coverage:

> Then too, another set of claims arise from the taking by the Government of lands belonging to the Indians, and without making compensation. Now those lands may have been recognized by treaty or they may not have been recognized by treaty, or the treaty may not have been ratified, as in the case of the California Indians, for instance. [House Hearings, p. 60.]

The Commissioner stated that in his opinion, one of the first cases that would be brought to the Commission, if it were created, would be the case of the California Indians.

The Department of the Interior submitted a draft containing its proposed amendments to H.R. 1198. These amendments provided for the reinsertion of the "unratified treaty" clause which had appeared in previous bills; the "revision of

treaties" clause was expanded to include mutual and unilateral mistake of law and fact as had previous bills; the old "fair and honorable dealing" language was reinserted in place of the language "claims of whatever nature which morally exist." The Department's explanation of the proposed changes was as follows:

> The suggested amendments to the first paragraph of this section * * * are for the purpose of defining more exactly the principal classes of Indian tribal claims that might be considered by the Indian Claims Commission. Unratified treaties have been involved, either affirmatively or as a matter of defense, in a number of Indian claims. Instances also exist of claims founded upon unilateral mistakes or upon mistakes of both law and fact. The language "fair and honorable dealings", when applied in conjunction with the other standards established by this section, would provide a yardstick for the adjudication of moral claims. [House Hearings p. 116]

On June 14, 1945, further amendments to H.R. 1198 were proposed by the Department of the Interior. The ground of "unconscionable consideration" was added to the "revision of treaties" clause. The "unratified treaty" language that had appeared in so many previous bills and had been reinserted in H.R. 1198 on June 11, was omitted and the following language substituted:

> Claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant;

These changes were explained as follows:

> The changes of phraseology in clause (3) [revision of treaties clause] would give fuller expression to its [Congress'] apparent intent of placing treaties and agreements between the Government and Indian tribes on the same footing with contracts between the Government and non-Indians, insofar as necessary to permit application of the recognized equitable principles under which contracts may be reformed or set aside for fraud, duress, unconscionable consideration, mistake, and kindred wrongs. Additional [sic] of the new clause (5) [the unratified treaty clause substitue] would give express recognition to one of the most clearly just and grievously resented classes of claims, that growing out of the scattered instances where lands peaceably held under an uncontested Indian title have been expropriated without an act of cession on the part of the Indians, or where the Government has retained ceded land notwithstanding its failure to ratify or carry out the terms of the cession. * * * [House Hearings p. 141]

At that time the Committee was fully aware of the fact that a number of special jurisdictional acts were then pending and it was the hope of Congress that passage of the Indian Claims Commission Act would render unnecessary the passage of those special acts. There was prepared and presented to the Committee a list of such tribal claims tentatively formulated but not prosecuted, in connection with which special jurisdictional acts were then awaiting Congressional action. Among them was an act for the Snake or Piute Indians of the Former Malheur Reservation and the land in con-

nection with which that tribe was making its claim was land in which the tribe had only Indian title.

H. R. 4497 was substituted for H. R. 1198 and, on May 20, 1946, this bill was debated and passed by the House of Representatives. In the course of the debate, a letter of the Attorney General was read into the record. In the course of that letter the Attorney General made the following statement:

> With respect to section 24, which in effect provides for a general jurisdictional act for all legal claims of Indian tribes arising in the future, I may say that the primary purpose of establishing an Indian Claims Commission, as I understand, is to furnish redress to the Indian tribes with respect to claims arising against the United States during the period of the settlement and expansion of the country. Most of these claims, I assume, are of a moral character and are not based upon legal principles. Thus, the problems presented by the proposal made in section 24 are quite different from those dealt with in the remainder of the bill. * * * [Congressional Record—House, May 20, 1946, p. 5311.]

The Attorney General stated that he was unable to recommend enactment of the bill.

In June 1946, the Senate Committee on Indian Affairs commenced hearings on H. R. 4497. The Committee members and those testifying, all agreed that the clause providing for claims arising from the taking of lands owned or occupied by the claimant, by treaty or otherwise (then clause (5), later renumbered (4)), would permit suit by both the treaty and non-treaty California Indians for

the taking of their Indian title lands. The word "taking" here used with reference to "Indian title" land was obviously not used to denote a taking in the constitutional sense.

On July 13, 1946, the Senate Committee met to consider amendments to H. R. 4497 proposed by the Department of Justice. The proposed amendments eliminated the revision of treaties clause, the clause relating to breaches of duty by a Government agent, and the clause relating to the taking of land owned or occupied by the Indians, by treaty or otherwise (the clause substituted by the House for the old "unratified treaty" clause). The Department of Justice representative explained that the clauses eliminated would have created liability in the United States whereas the other clauses did not, but merely provided a forum for legal claims. With respect to the fair and honorable dealings clause, the Department's representative stated his position to be that a claim could be maintained under that clause only with respect to land where the land held was reservation land, and not if the land was held by Indian title. The representative of the Department of the Interior suggested that the amendments proposed by Justice, when viewed in connection with the legislative history, might be interpreted to mean that the bill as amended by the Senate was intended to give Indian claimants less than the House bill gave them. The Committee Chairman indicated that this was not the case and that the Senate Committee Report would contain a statement to that effect. The Senate Report 1715 did contain a statement that the amendments were designed for the

sake of clarification only and were *not* intended to exclude from consideration of the Commission those claims which the House intended to include. However, the Senate Report also stated that the bill, as amended by it, represented the Committee's intent to provide only a forum for the Indian claimants to assert their claims and not to prejudge particular claims against the Government. H. R. 4497 as amended by the Senate was passed by the Senate on July 17, 1946.

The House of Representatives refused to agree to all the Senate amendments and the bill went to conference. On July 27, 1946, Conference Report No. 2693 was issued. This report reveals that the conferees of both Houses agreed to reinsert the "revision of treaties" clause and the "unratified treaties" clause in the same form passed by the House. The House agreed to the Senate's amendment omitting the clause relating to the unauthorized acts of the Government's agents. The Conference Report, as was customary, did not state the *reasons* for the reinsertion of the clauses, but the Statement of the Managers on the part of the House contained the following explanation:

> The bill, as passed by the House of Representatives, enumerated six classes of claims cognizable by the Commission. The Senate, in the interest of simplicity, reduced these to three, being careful to state in its report, that the change was not intended to deprive the claimants of the right to invoke the jurisdiction of the Commission in any case which would have been cognizable under the language of the bill as it passed the House. Out of an abundance of caution the conferees re-

inserted two of the classifications struck by the Senate *because they wanted to make sure that if any tribal claimant could prove facts sufficient to make a case under either of these classifications, the Commission would have authority to make an award to such claimant.*

The first of these classifications, consisting of "claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity" is aptly explained in the report of the House committee.[18] The second of these classifications covers claims arising from the taking by the United States of Indian lands, i.e., lands to which tribal claimants had "Indian title" or the "right of occupancy." Sometimes these lands were taken under the guise of unratified treaties, sometimes without any semblance of a treaty. The reinsertion of this classification makes it plain that where claimant can prove sufficient facts within the language of this classification the Commission has full authority to award proper damages therefor.

Both of the classes of claimants reinserted by this amendment may fall within the category of "fair and honorable dealings." To set them forth explicitly helps to clarify the contents of that category. [Italics supplied.]

The statement sets forth that the clause permitting claims on account of breach of duty by an agent of the United States while acting within the apparent scope of his authority was not reinserted

[18] See page 11 of House Report No. 1466, 79th Cong., 1st Sess., dated December 20, 1945.

because it was felt this claim was sufficiently covered by general law and by the other enumerated causes of action.[19]

From the above it appears that the last efforts to enact an Indian Claims Commission Act which would merely provide a forum for suit on legal claims and would eliminate the possibility of the Indians suing for and recovering on extra-legal or

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[19] Government appellant stresses the fact that the Statement of the Managers on the Part of the House concerning the Conference Report was not read in the Senate when the Conference Report was called up and voted on. Under the House Rules a conference report may not be received by the House without a written statement signed by a majority of the House conferees, in sufficient detail to inform the House of the effect of the amendments contained in the Conference Report. Rule XXIX, House Manual, H. Doc. 810, 79th Cong., 2d Sess., p. 441, in effect during the 79th Congress. The Senate rules did *not* require a statement of its conferees and it was not customary or necessary for the statement of the House conferees to be read in the Senate in connection with the Conference Report. The statement of the House Managers is as much a part of the legislative history of an act as is the Conference Report to which it relates. Contrary to the Government's contention, the Statement of the House Managers was not contrary to the Conference Report. In the first place, the Conference Report did not attempt any interpretation of the amendments agreed to but merely reported what they were. The Statement of the House Managers explained the reason for the amendments and the effect of those amendments. The Government's reference to *Blackfeet Indians* v. *United States*, 127 C. Cls. 807, is inapposite in this connection because the court was there concerned with the *supplemental* Statement of the Managers on the Part of the House, which, it is conceded, was not read to the House when it voted on the Conference Report, and which, on the issue of the defense of *res judicata*, was in conflict with the Statement which *was* read in the House. It so happens that the Supplemental Statement does not conflict with the original Statement in respect to the meaning of clauses (3) and (5), or the reasons for their reinsertion in the bill finally enacted.

moral claims, involving, among other things, their Indian title land, met with failure. The legislative history of the Act establishes that from the beginning in 1928, certain members of Congress desired the enactment of a bill which would settle extra-legal or moral claims of Indians against the United States, including claims based on their Indian title property right in land which the Government had either taken without the formality of a treaty, or which the Government had acquired under ratified treaties procured by fraud, duress, unconscionable consideration, etc., or concerning which the Government had been guilty of dealings less than fair and honorable. This desire on the part of certain members of Congress became the desire of the majority of Congress and, with the passage of the Act in 1946, became the legislative intent expressed in clauses (3), (4) and (5) of section 2.

This meaning, or legislative intent, revealed by the legislative history, merely corroborates the literal meaning of those clauses and renders them consistent with each other and with the legislative purpose also revealed in the Act's language and its history.

The Supreme Court has not yet considered or decided the issue just discussed, but in a recent decision it has, we think, indicated a view consistent with the view we take concerning the coverage of section 2 of the Act with respect to claims concerning Indian title land. The claim asserted in *The Tee-Hit-Ton Indians* v. *United States,* 348 U. S. 272, arose under section 24 of the Indian Claims Commission Act as codified by 28 U. S. C. 1505. Section 24 merely extended to Indian claimants the same rights to sue the United States in the

Court of Claims as are possessed by non-Indians. Section 1505 provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group. (63 Stat. 102.)

The Court held that a claim for just compensation under the Fifth Amendment to the Constitution for the taking by the United States of Indian title land held by Alaska Indians was not justiciable under the above quoted law because Indian title was not such a property interest as would give rise to a cause of action under existing rules of law or equity. In discussing the nature of the petitioner's claim, the Court stated at page 273:

> This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force, and to grant payments from the public purse to needy descendants of exploited Indians. The legislation in support of that policy has received consistent interpretation from this court in sympathy with its compassionate purpose.

Footnote 2 to the above statement first cites the Indian Claims Commission Act as an example of the legislation in support of the described policy.

It also cites *Worcester* v. *Georgia,* 6 Pet. 515 *at* 582. At the page to which the court refers, the following statement appears:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.

The court next refers to pages 87 and 89 of *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, where the following language appears:

> * * * The question is one of construction—of determining what Congress intended by the words "the body of lands known as Annette Islands."
>
> As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained. * * *
>
> This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *Choate* v. *Trapp,* 224 U. S. 665, 675, * * *.

The Court then refers to page 354 of *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, on which page the following language appears:

> But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate* v. *Trapp*, 224 U. S. 665, 675, the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

Later in its opinion in the *Tee-Hit-Ton* case, pp. 281, 282, the Court stated:

> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. 60 Stat. 1050.

The Indian Claims Commission Act of 1946 begins on page 1049 of 60 Stat. On page 1050 appears section 2 of that Act, under clauses (3) and (5) of which Indian appellants in the instant case are suing.

Under all the circumstances discussed above, we can find no valid reason for implying the exception to clauses (3) and (5) urged by Government appellant and holding that the words "treaties" and "dealings" used in those clauses were not intended

by Congress to include treaties and dealings concerning Indian title land. We accordingly hold that the Commission had jurisdiction to hear and determine and make final awards in connection with Indian appellant's claims involving Indian title land under clauses (3) and (5) of the Act, and the Commission's holding to this effect is affirmed.

We shall now consider the several issues raised on the appeals from the Commission's final determinations on the seven causes of action.

First Cause of Action

This cause of action is urged under section 2 (3) or, in the alternative, under section 2 (5) of the Indian Claims Commission Act. Indian appellants allege that because of duress and for an unconscionable consideration, they ceded their land to the United States under three treaties, i. e., Treaty of July 15, 1830 (7 Stat. 328), Treaty of October 15, 1836 (7 Stat. 524), and Treaty of March 15, 1854 (10 Stat. 1038). In the alternative, Indian appellants allege that the Government's dealings with them in connection with the land ceded were not fair and honorable.

The Commission dismissed the first cause of action on the ground that there was no substantial proof in the record that the claimants actually and exclusively occupied and possessed at any time, any definite and ascertainable portion of the land ceded. The Commission found (finding 6) that at the time of the 1836 treaty, the lands described in Article 1 of the treaty were used, occupied, and hunted over by a number of Indian tribes, including those who

were parties [20] to the treaty, but that no one tribe had exclusive possession of any definite area thereof.

On March 1, 1955, the Indian appellants filed a motion in this court asking the court to vacate the determination of the Indian Claims Commission dismissing the first cause of action and to remand the case so far as that cause of action is concerned, in order to permit the Commission to act on a motion pending before it filed by the Otoe and Missouria Tribe, to determine its claim concerning the land ceded by the Treaty of July 15, 1830, *supra,* on the basis of the record in the case of *Iowa Tribe, et al.* v. *United States,* Docket 138, and the record relating to the first cause of action in the instant case. It is Indian appellants' position that evidence adduced in the *Iowa* case from the testimony of one of the Government's expert witnesses, has a direct bearing on the claims asserted by the Otoe and Missouria claimants in the first cause of action herein and that its consideration by the Commission might well lead to a determination favorable to the claimants herein on the first cause of action.

In opposing the motion, the Government does not contend that the record before the Commission on the claimant's first cause of action was a complete record, but it says that the material bearing on that claim and presented to the Commission in the *Iowa* case was as available to the Otoes as

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[20] Sacs and Foxes, Medawah-Kanton, Wahpacoota, Wahpeton and Sissetong Bands or Tribes of Sioux, Omahas, Ioways, and claimants.

it was to the Iowas or to the Government through whose witness it was adduced.

If this were ordinary adversary litigation, we should be inclined to deny the motion. However, as we pointed out in the case of *Pawnee Tribe* v. *United States*, 124 C. Cls. 324, Congress was desirous that these claims be "cleaned up" and decided on the fullest possible records and to that end it went so far as to provide for the establishment of a Division of Investigation within the Commission to make, where necessary, an independent search and investigation into the facts and make available to the parties any data so discovered. In the *Pawnee* case the facts and data on the basis of which the court remanded the case to the Commission for further consideration, were not called to the attention of the court or the Commission by either of the parties. In the instant case, the claimants have called the attention of the Commission and this court to data which, it appears, does have some material bearing on the first cause of action. It is true, as pointed out by the Government, that claimants could have, with the exercise of diligence, developed these facts and presented them to the Commission at the time of the trial, and we are not excusing counsel for failure to do so, but we cannot ignore the emphasis placed by Congress on the necessity that these cases be settled finally on the most complete records available to insure that at some later date the claimants will not again press Congress for special legislation to permit the litigation of matters not fully explored. Since we find it necessary to remand the case on another issue, we shall accord-

ingly allow Indian appellants' motion to vacate the Commission's final determination in the first cause of action and remand the cause for further proceedings.

Second Cause of Action

This cause of action is urged under clauses (3) and (5) of section 2 of the Act, and is concerned with Articles X and XI of the Treaty of July 15, 1830, *supra,* and the Government's actions in connection with the subject matter of those articles.

Article X provided in part as follows:

> The Omahas, Ioways, and Ottoes, for themselves, and in behalf of the Yancton and Santie Bands of Sioux, having earnestly requested that they might be permitted to make some provision for their half-breeds, and particularly that they might bestow upon them the tract of country within the following limits, to wit; * * * it is agreed that the half-breeds of said Tribes and Bands may be suffered to occupy said tract of land; holding it in the same manner, and by the same title that other Indian titles are held; but the President of the United States may hereafter assign to any of the said half-breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section, of six hundred and forty acres to each individual. And this provision shall extend to the cession made by the Sioux in the preceding Article.

Article XI provided:

> The reservation of land mentioned in the preceding Article having belonged to the Ottoes, and having been exclusively ceded by

them; it is agreed that the Omahas, the Ioways and the Yancton and Santie Bands of Sioux shall pay out of their annuities to the said Ottoe Tribe, for the period of ten years, Three hundred Dollars annually; of which sum the Omahas shall pay one hundred Dollars, the Ioways one hundred Dollars, and the Yancton and Santie Bands one hundred dollars.

The Commission found that the United States had not requested or suggested that the Otoes cede any part of their lands to the halfbreeds, but that it merely acceded to the desires of the Indians and thereafter acted as trustees for the halfbreeds, holding and allotting the major portion of the lands to them as provided in the treaty. The lands were allotted and patents issued to the halfbreeds, and the Otoes received the $3,000 stipulated in the treaty from the other tribes.

In making the survey of the lands ceded to the halfbreeds, the Government surveyor made an error excluding some 15,697 acres from the area called for by the terms of the treaty. When an 1855 resurvey disclosed this error, Congress authorized an adjustment for the shortage by payment to such half-breeds at the rate of $1.25 per acre for the deficiency. Indian appellants contended that some 45 acres of halfbreed land were never allotted. The Commission made no finding on this portion of the claim.

Indian appellants contended that the 3.26 cents per acre they received for the land ceded for the benefit of the halfbreeds of other tribes was so inadequate as to be unconscionable. It is urged that the Government, as guardian for the Indians,

owed them the duty of preventing them from disposing of their land at such a price, particularly since the Otoes owed no duty whatsoever to the halfbreeds of the other tribes; that fair and honorable dealings require that the Otoes be reimbursed for the true value of all lands ceded which were for the benefit of halfbreeds of other tribes. Indian appellants also contend that in so far as the Government failed to assign lands erroneously omitted by the survey, the purpose of the cession of those 15,697 acres failed and such lands should have been held by the Government as trustee for the Otoes who should have been paid the true market value of those lands.

The Commission dismissed this cause of action on the ground that the Indian claimants had not established any claim against the Government under either clause (3) or (5) of section 2. We are of the opinion that the Commission's conclusions are justified not only from the evidence adduced, but also from the allegations in the petition, which, on their face, fail to state a cause of action on this claim against the Government within the meaning of the Act. Articles X and XI of the 1830 treaty actually represent dealings between the Otoes and certain other Indian tribes whereby they accomplished, with the cooperation of the Government, certain objects which they all desired. Not only is there no evidence, but there is no allegation in the petition, to the effect that the Government induced the Otoes to enter into an arrangement which they now consider to have been detrimental to their best interests. From all that appears in the petition and in the record, the

Indians appear to have known what they were doing and were under no misapprehensions whatsoever. It is not unreasonable to suppose that the Otoes wished to benefit their own halfbreeds and those of friendly tribes by selling for a nominal sum sufficient land on which those halfbreeds might live. This is quite different from the situation in the *Osage* [21] case where it was unreasonable to conclude that the Indians would have willingly relinquished property to be used for the benefit of other Indians with whom the Osage were not on friendly terms and would have no reason to wish to benefit.

Nothing in the circumstances of this claim indicates any failure of the Government to act fairly and honorably with respect to Indian appellants. Certainly the Government was under no duty to prevent the Otoes from doing what was a sensible and generous act.

The Commission also held that as to the 15,697 acres of land omitted from the first survey, the cession of that land to the halfbreeds had been an outright one leaving no remaining property rights in the Otoes, and, accordingly, the Government's action in paying the halfbreeds for the land they did not receive, was proper. We find no merit in Indian appellants' argument that because of the erroneous survey the purpose of the cession failed and left the Government in the position of holding the lands in trust for the grantors, i. e., the Otoes. Title to the land, including that omitted from the survey, was in the halfbreeds upon the

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[21] *Osage Nation of Indians* v. *United States*, 119 C. Cls. 592, cert. den. 342 U.S. 896.

ratification of the treaty and there it remained (regardless of the fact that some white settlers came upon it), until the halfbreeds' title to that land was extinguished by later act of Congress.

While the Commission might have disposed of appellant Indians' contentions regarding the 45 acres of land not yet allotted, it seems to us from what has been said that what happened to that land is no real concern of the Otoes but rather of the halfbreeds and therefore the omission cannot be regarded as prejudicial error.

The Commission's final determination of the second cause of action is affirmed.

Third Cause of Action

Indian appellants' third cause of action is brought under Section 2 (3) and (5). In this cause of action the Otoes alleged that under the Treaty of September 21, 1833 (7 Stat. 429), they ceded 792,000 acres of land held by them under Indian title (immemorial possession and occupancy), for an unconscionably low consideration. The Commission held that the Otoes had established Indian title (exclusive possession and occupancy from time immemorial) to the land involved; that the tribe had been paid 4.9 cents per acre for land which was actually worth 75 cents per acre, and concluded that such consideraiton was unconscionable and for that reason the Otoes were entitled to an award in the net amount of $554,589.85, less allowable offsets.

The Government has appealed from this deter-

mination on the grounds, (1) that the Commission did not have jurisdiction under the Act to entertain this cause of action because the claim involved original Indian possessary title land; (2) that the evidence failed to establish Indian title (exclusive possession) in claimants, and (3) that the land was worth far less than 75 cents per acre.

We have hereinbefore fully discussed and disposed of the Government's first jurisdictional ground for appeal. In support of its second ground, the Government urges that the Commission's findings of fact are meager and wholly inadequate to support the ultimate findings and conclusion that the Otoes at the time of the treaty of cession and from time immemorial had had exclusive possession and occupancy of a definable area. The Government does not show in what respect it considers the findings meager and inadequate. It says only that the Commission's conclusion concerning exclusive use and occupancy of a definable area is unsupported by the record, mentioning specifically the testimony of Government's witness, Mrs. Wedel. The Government also lays stress on the fact that Article I of the 1833 treaty gives no western or southern boundary to the cession. In this connection, it should be noted that the parties entered into a stipulation and agreement fixing the boundaries of the land covered by this cession and also by a later cession in 1854, and the Commission relied on these stipulations, as it had a right to do, in finding the area which the treaty purported to cede.

Having found the area which the parties intended to cede in the 1833 treaty, the Commission then found that the claimants actually possessed, used and occupied this area from time immemorial to the time of the cession to the exclusion of other Indians. The findings indicate that the Commission relied on data in connection with the halfbreed cession in 1830 and the cession covered by the Treaty of March 15, 1854, *supra*, and the supplemental Treaty of December 9, 1854, (10 Stat. 1130). The Commission also relied on evidence that no other tribes claimed or used the areas ceded by the treaties and that neighboring tribes recognized these lands as being the exclusive property of the claimants. The Commission specifically referred (finding 13) to the report of Commissioner Ellsworth, who negotiated the 1833 Treaty, in which he stated that he had found exclusive Indian title to the land ceded to be good in the claimants.

The Commission also relied on and made findings on the basis of expert testimony by Dr. B. B. Chapman, a well-known historian in the field of American History, and a recognized authority on the land tenure of the Otoe and Missouria tribe. The Commission's finding that the claimants actually occupied the area in question to the exclusion of other Indians is amply supported by Dr. Chapman's evidence and other evidence. The Commission also refers in its findings (finding 13) to statements of George W. Manypenny, Commissioner of Indian Affairs, and James M. Gatewood, Indian Agent, concerning the exclusive occupancy ownership of the Otoe and Missourias of the land in question.

A careful study of the record on this cause of action reveals that it contains substantial support for the findings of the Commission and little, if any, support for contrary findings. More detailed findings might have been made on this claim, but we think that those made were adequate and sufficient to indicate the basis for the Commission's ultimate finding of Indian title in claimants to a defined area of land. In making its findings the Commission did take into consideration every essential part of the record on this claim, and defendant's citation of *Snake or Piute Indians* v. *United States,* 125 C. Cls. 241, is inapposite.

The Commission found that the lands involved in the 1833 cession were worth 75 cents per acre in 1833. Defendant contends that this valuation is in error and that in any event there are no primary findings of fact sufficient to indicate the basis on which the Commission arrived at this valuation.

Under the principles discussed in this court's decision in the *Snake or Piute* case, *supra,* finding 14 concerning value is an ultimate finding without a full statement of subsidiary findings of the primary facts. The *Snake* decision *supra,* was, however, issued several months after the Commission's decision in the instant case. In the recent decision by the Commission in the case of *The Osage Nation of Indians* v. *The United States,* Docket No. 9, August 13, 1954 (3 Ind. Cl. Com. 217), the Commission has made comprehensive and detailed findings of the primary facts supporting ultimate findings of the value of land. In the *Snake* case the Commission was furnished with adequate proposed

findings by the claimant. In the instant case, the proposed findings submitted to the Commission on value are practically useless in the light of the standard followed in the *Osage* case.

In view of the above circumstances, we have reviewed the evidence of record on value submitted by the parties in order to determine whether or not further primary findings on that evidence would support the ultimate finding made by the Commission. (Cf. *Fletcher* v. *Fletcher*, 219 F. 2d 768.) We are of the opinion that the evidence of record fully supports the Commission's findings on the question of value of the land.

The Government's evidence of value of the lands in question is derived from the testimony and report of John Muehlbier, Agricultural Economist of the United States Department of Agriculture. The evidence prepared and submitted by the Government's witness was in support of the Government's contention that the only cognizable value of Indian land ceded at a remote time and in an area not yet open to public sale or settlement, is "market value" notwithstanding the fact that under the circumstances there could be and was no actual market in the sense contended by the Government. He made a study of the so-called use value of the land and concluded that on that basis the land was worth from two to fourteen cents per acre. He arrived at this conclusion by estimating the money value of the Indians' subsistence derived from such land, the proportion of gross income that could be attributed to the land, the rate of capitalization, the

number of persons in the tribe, and the acreage claimed as hunting grounds.

As noted by the Government in its appeal, the Commission obviously rejected the valuation method proposed by the Government and relied on the method urged by the Indian claimants in arriving at the determination that the land had a value of 75 cents per acre at the time it was ceded.

The method of valuation proposed by the Indian appellants is along the lines adopted by this court in many cases and in particular in *Alcea Band of Tillamooks* v. *United States,* 115 C. Cls. 463 (reversed as to interest, 341 U. S. 48), *Rogue River Tribe of Indians et al.* v. *United States,* 116 C. Cls. 454, cert. den. 341 U. S. 902. The same method of valuation was followed by the Indian Claims Commission in the *Osage* case (3 Ind. Cl. Com. 217). In those cases the court and the Commission rejected the notion that the value of Indian lands must be based on market value alone because the market for such lands was absolutely controlled by the only possible purchaser, i. e., the Government either direct or in trust for sale. Until Indian title to an area of land is extinguished and the land is surveyed, no sales thereof or settlements thereon are possible.

In the instant case the surrounding lands were not open to settlement because the Government had not yet extinguished Indian title thereto. But that does not mean that such land was worth no more than the value of the subsistence it provided for the Indians. In the absence of a market at the time in

question, and therefore the absence of evidence of "market value" in the conventional sense, this court and the Commission have taken into consideration numerous other factors in determining the value of lands ceded by the Indians. The Indian appellants' expert witness, Thomas H. LeDuc, took those other factors into consideration in giving his opinion of the value of the ceded lands. For the most part the factors were the same as those relied on by the Commission in its recent *Osage* findings, and follow, to some extent, the pattern laid down in the *Alcea* and *Rogue River* decisions in this court. This method of valuation takes into consideration whatever sales of neighboring lands are of record. It considers the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value, water power, its then or potential use, markets and transportation—considering the ready markets at that time and the potential market. LeDuc concluded that the land ceded in 1833 was worth not less than $1.50 per acre.

We think that the factors taken into consideration by claimants' expert witness were valid factors in the determination of the value of Indian lands under the circumstances of this case and similar cases. We believe that the results of such consideration will more nearly accomplish the fair settlement of these claims desired by Congress than the "subsistence" approach advocated by the Gov-

ernment. Values cannot be determined on the basis of berries and wild fruits. In the *Alcea* case, the Supreme Court had an opportunity to reject the method of valuation used by the Commission in this case, but it confined its consent to review, in view of the consent to sue given by Congress, to the question of an additional allowance by way of interest and refused to review the question of valuation.[22]

If the Commission had made detailed evidentiary findings on the basis of the evidence of value submitted by claimants, we are of the opinion that such findings would have supported its ultimate finding that the land ceded in the treaty of 1833 was then worth 75 cents per acre. What has been said is not to be taken as a statement that this court would necessarily have come to the same conclusion as the Commission, but rather that the Commission's conclusion is based on substantial evidence contained in the whole record and that primary findings adequate to support its ultimate finding could have been made on such whole record. Accordingly, we affirm the Commission's final determination concerning the Third Cause of Action.

Fourth Cause of Action

Under this cause of action the Indian appellants claimed that pursuant to the Treaty of March 15, 1854 (10 Stat. 1038), they ceded 1,250,000 acres of land in Nebraska for a consideration that was either unconscionable within the meaning of clause (3)

[22] *United States* v. *Tillamooks*, 340 U.S. 873.

of section 2 of the Act, or was sufficiently less than the true value of such land as to represent dealings less than fair and honorable on the part of the Government under clause (5).

The Commission held that the Indian appellants had good original Indian title to the land ceded, that the land was worth $1.00 per acre, and that the consideration paid of 42 cents per acre was, if not unconscionable, at least sufficiently inadequate to represent dealings less than fair and honorable on the part of the Government. Both parties have appealed from this determination.

The Government's first ground of appeal, that the claim is not maintainable under section 2 of the Act because the land was held by Indian title, has already been disposed of.

The Government's second ground of appeal is that the Commission's finding that the Indian appellants had good Indian title is not supported by substantial evidence. Our review of the whole record persuades us that the Commission's findings are based on substantial evidence.[23]

The Government and one of the Commissioners object to the finding of the amount paid by the Government as consideration for the cession because (1) of the failure to determine how much of the cash paid was for the relinquishment of the Indians' claims *east* of the Missouri River, and (2) because of the majority's treatment of the reservation of 162,107.71 acres ultimately assigned to the Otoes in the Supplemental Treaty of December 9, 1854, 10 Stat. 1130.

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[23] As in the third cause of action, the parties have stipulated as to the area ceded.

The Treaty of March 15, 1854, provided for a cession by the tribe to the United States of what the parties have agreed was approximately 1,250,000 acres of land in Nebraska held by the tribe by Indian title. Article 1 of this treaty provided for the setting aside of a reservation 10 miles wide and 25 miles long, which, according to the description in the treaty and contemporaneous maps in evidence, lay within the outer limits of the larger area ceded and located in the southwest corner thereof. On October 23, 1854, George Hepner, Indian Agent of the Council Bluffs Agency, wrote to Col. H. Cumming, Superintendent of Indian Affairs at St. Louis, concerning a trip he had just made to examine the reservation carved out of the cession by the March 15th treaty. He stated that the reservation was in an unsuitable location for the tribe because it had insufficient timber for their needs and "because they will be more exposed to the attacks of their enemies there than they would be on the opposite side, the river forming a barrier." Other documents in evidence show that following the 1833 cession, the Otoes had become more sedentary in their mode of life and had taken up farming; that they were frequently attacked by the Sioux and did not always receive the protection they had been promised by the Government. A location for their reservation which would provide natural protection from invaders was of the utmost importance. Accordingly, the Supplemental Treaty of December 9th was negotiated, and under its terms they were given a reservation to the south of the March 15th cession. The reservation was the same size as that provided for in the earlier treaty

and was located on the boundary of Kansas and Nebraska, a small strip of the reservation being in Kansas.

The parties agree that both the reservation originally intended for the Otoes within the boundaries of the March 15th cession, and the reservation actually granted to them by the December 9th treaty, consisted of 162,107.71 acres. As a result of the two treaties, the Otoes ceded to the United States 1,250,000 acres of their land and the Government granted to the Otoes 162,107.71 acres of public land in the same vicinity. The Commission upon all the evidence considered all of this land to be worth, as Indian title land, on the average of $1.00 per acre. The evidence in the whole record supports this valuation. This would mean that if the Otoes had received what the land was worth as Indian title land in that area at that time, they would have received $1,250,000, less the $463,423.74 (the cash payment provided for in the treaty), and less the value of the reservation land to the south of the cession granted to them in December 1854, having a value of $162,107.71, making a total received of $625,531.45. Accordingly, the Commission correctly concluded that under the treaty, the Otoes received $624,468.55 less than they were fairly and justly entitled to for the cession of the 1,250,000 acres of land in 1854.

The Government and the dissenting Commissioner object to the majority of the Commission's assignment of $1.00 an acre as the value of the December 9th grant of the 162,107.71 acre reservation, and note that no specific proof was offered by the Indans as to the value of that land in 1854.

On the basis of the whole record, including the testimony of Mr. LeDuc, the assignment by the Commission of $1.00 an acre to this tract does not appear to be arbitrary. The land included in this tract appears to have been of the same character as that included in the cession a few miles to the north, and we believe the Commission was justified in concluding on the record that it had the same value.

As to the value to be assigned to the Otoe's cession and relinquishment of its rights east of the Missouri River, the Commission was of the opinion that no significant part of the consideration paid under the March 15, 1854 treaty was for such relinquishment and the Commission attributed none of the consideration paid as in payment for such rights or claims. In view of the state of the record on this point, we cannot say that the Commission was wrong.

On the question of value, the Government contends that $1.00 an acre is too much and the Indians urge that it is too little. The Indians' expert, LeDuc, was of the opinion that the land was worth from $2.00 to $5.00 an acre. The Government expert was of the opinion that the land was worth from 10 cents to 49 cents per acre. On the basis of the whole record, we think the Commission's finding that the land was worth $1.00 per acre to be supported by substantial evidence.

The Government has objected to the Commission's holding that if this disparity of more than fifty percent between the value of the land at the time of cession and the consideration paid does not in law amount to unconscionable consideration,

it at least represents lack of fair and honorable dealings on the part of the Government. The petition before the Commission states this cause of action in the alternative and the Commission, apparently in doubt concerning the unconscionable consideration claim, was not uncertain that the claimants had made out a cause of action on the fair and honorable dealings claim. In finding 13 the Commission refers to the circumstances under which the 1854 treaty was negotiated. The record on this point reveals that the tribe was impoverished and demoralized by the constant encroachment of white settlers on their lands and by the repeated attacks from the Sioux, against neither of which the Government had provided the promised protection. The Commission believed that a certain amount of duress was practiced on the tribe in the negotiation of the treaty and the record supports that belief and the resulting conclusion that the whole transaction, including the surrounding circumstances and the inadequate consideration, does not comport with fair and honorable dealings on the part of the Government.

Both appeals are hereby denied and the final determination of the Commission on this cause of action is affirmed.

Fifth and Sixth Causes of Action

The Fifth cause of action involves the sale by the United States of 119,846.17 acres of land off the west end of the reservation granted to the Indian appellants under the Treaty of December 9, 1854 (10 Stat. 1130), discussed in the fourth cause of action.

The Act of June 10, 1872, 17 Stat. 391, provided that with the consent of the Otoe and Missouria Indians, expressed in open council in the usual manner, the Secretary of the Interior was authorized to cause to be surveyed a portion of the Otoe and Missouria reservation from the western part thereof; that the lands so surveyed should be appraised by three competent commissioners, one to be selected by the tribe and two appointed by the Secretary of the Interior; that thereafter, the Secretary was authorized to offer the lands for sale for "cash in hand"; that sealed proposals, duly invited by public advertisement, should be received for tracts not exceeding 160 acres each, and also for the whole body of land; that the Secretary was also authorized to accept a proposal for the entire tract, or the highest bids for separate tracts, whichever should be best for the Indians. The Act also provided that no bids could be accepted for less than the appraised value nor less than $1.25 per acre. The Act provided for the placing of the proceeds to the credit of the Indians with interest at five percent per annum, except what was needed for the use of the Indians; that not more than twenty-five percent of the principal received from the sales could be spent in any one year; that no sale should be approved unless the *average* sale's price of each parcel should be at least $2.50 per acre.

On August 15, 1876 (19 Stat. 208), Congress passed an act providing that with the consent of the Otoe and Missouria Indians, expressed in open council, the Secretary of the Interior was authorized to have the lands surveyed; that thereafter the lands should be appraised and 120,000 acres from

the western end of the reservation offered for sale for "cash to actual settlers only," in tracts not exceeding 160 acres to each purchaser. The Act then provided that if the Secretary deemed it more advantageous to sell the lands upon *deferred payments,* he might, with the consent of the Indians expressed in open council, sell such lands for one-third in cash, one-third in one year, and the remainder in two years from the date of sale, with interest at six percentum per annum; that none of the land should be sold for less than the appraised value and in no case for less than $2.50 per acre. The Act also provided that the expenses of the sale should be paid out of the proceeds.

On March 3, 1879 (20 Stat. 471), Congress amended the Act of August 15, 1876, to provide that when an actual settler, wishing to purchase a tract, applied for something slightly more than the 160 acres permitted, his application should not be rejected on account of such excess; that bona fide claimants then occupying the lands under the 1876 Act might, in the discretion of the Secretary of the Interior, be allowed additional time for making the deferred payments, not exceeding one year on each payment so required to be made.

The lands in question were appraised at an average value of $3.56 per acre and were sold for an average price of $3.85 per acre.

Indian appellants alleged that the restrictions concerning the sale of the lands were inserted in the three above acts for the sole benefit of the Government and its white citizens, and that they tended to discourage and prohibit the purchase of the lands by investors (as distinguished from actual

settlers) who might have paid more for the lands; that the lands were not advertised for sale, as required by the Act, but preference was given to persons already on the lands to purchase the lands at their appraised value. The Indian appellants also alleged that their consent to the provisions of the above acts was not freely given but rather was procured by duress as evidenced by the fact that at that time white settlers had encroached on the reservation making the Indians' possession untenable and forcing them to agree to the terms proposed by the Government; that the restrictions imposed on the sales set forth in the three acts were unfair to the Indians and resulted in their receiving unconscionable consideration since the lands were worth far more than the appraised value. This claim is asserted under clauses (3) and (5) of section 2.

The sixth cause of action concerns the sale of the remainder (eastern portion) of the 1854 reservation pursuant to the Act of March 3, 1881 (21 Stat. 380), which contained substantially the same provisions as did the acts relating to the sale of the western portion of the reservation including the provisions for deferred payments. The Indian appellants made the same contentions regarding these sales which were at twice the amount of their appraised value [24] of approximately $6.

The Commission, dismissing both causes of action, noted that the appraised values were agreed to by the appraiser selected by the tribe and that the same appraiser was selected for both tracts.

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[24] The lands were sold for an average of $12.22 per acre. Indian appellants contend they could have brought $15.23 per acre under less restrictive sales provisions.

The Commission found that the evidence in the record did not support the allegation of duress and that in view of the fact that the land sold for more than the appraised value in all instances, the consideration was not unconscionable. We think the Commission was right in its conclusions. The fact that the four acts in question may have been beneficial to the Government and its settler-citizens does not mean that it was not also beneficial to the Indians, and, under all the circumstances, it appears that the Indians were benefited. The Commission also concluded that the Indians' consent was secured in open council as the acts required, and that there were no irregularities in violation of the acts' provisions as would invalidate the sales made thereunder.

We hold the Commission's findings and determinations on these causes of action to be supported by substantial evidence and they are accordingly affirmed.

Seventh Cause of Action

In this cause of action the Indian appellants claimed that the Government, by fraud and duress, induced the Indians to enter into a compromise settlement on November 20, 1899, with certain delinquent purchasers of land sold pursuant to the 1881 Act, *supra,* whereby $168,784.08 due and owing by these purchasers of certain land was forgiven. This cause of action is urged under section 2 clauses (3) or (5).

The purchasers of the land in question were in default in their payments to the extent of $288,583.08 and it was their position that the land had been sold to them at prices far in excess of its actual

value (this land was sold for twice the appraised value on the average), and that in fairness and equity the contracts of sale should be adjusted and rebates or reductions granted. By the Act of March 3, 1893 (27 Stat. 568), the Secretary of the Interior was duly authorized by Congress to revise the contracts of sale if the Indians consented to such revision. After prolonged negotiation, a compromise settlement was agreed to by the Indians and the purchasers, on November 20, 1899, and it was thereafter ratified by Congress on April 4, 1900 (31 Stat. 59).

The Indian appellants contend that the settlement was executed in an irregular way by the tribe and not in formal council, and that the United States Indian Inspector, James McLaughlin, was guilty of highly questionable conduct. The record does not support this contention.

The settlement provided that the delinquent purchasers might have the land at the appraised value plus 25 percent thereof, plus annual interest at five percent from the time of the purchase, and for the immediate payment of the purchase price on the basis of such revised sales price.

The Commission held that despite any irregularities which may have occurred in procuring the consent of the Indians to the settlement, the agreement was signed by three-fourths of the adult members of the tribe, though not in council; that the settlement was not for the benefit of the Government but for the mutual benefit of the Indians and the purchasers and was an agreement between them and not between the Indians and the United States. The Commission found that it was not established

that the Indians were deceived or misled by the United States agent, and under the resulting agreement the Indians received more than the price which their own appraiser had deemed fair.

The evidence regarding this claim was assembled by Indian appellants' expert witness, Dr. B. B. Chapman (Plaintiff's Exhibit 47), in a thorough and painstaking report. A study of that report reveals that due to a conspiracy of cattlemen and speculators, the price of the lands in question was "rigged" at the public sales; that several sales had to be held; that in spite of every effort on the part of the Government agents conducting the sales, many bona fide settlers had to bid prices far in excess of the fair market value of the land in order to secure the land; that on the occasion of some sales, members of the conspiracy paid prospective purchasers not to bid so that the lands could be secured at low prices by persons who wished to graze cattle thereon for limited times and intended to default in payment when the land had served their purposes. It appears from the record that the Government did its best to carry out its obligations to the Indians and also to the bona fide settlers. The report describes the successive crop failures between 1894 and 1899 which made it difficult and at times impossible for some of the settlers to keep up their payments. During all this time there was constant pressure from some of the delinquent purchasers to revise the purchase contracts so that they would not have to pay the amounts still due. On several occasions the Indians agreed to settlement proposals submitted to them by the Government, but the delinquent purchasers refused to agree. Finally

the settlers were persuaded to agree to the compromise in question, and it was submitted to the Indians in open council by the Government inspector. The Indians did not agree to the settlement at that council which was accordingly adjourned for a few days. Being persuaded that the settlement represented the best terms for the Indians that the delinquent purchasers would agree to, and also that the Congressional representatives of the delinquent purchasers would never permit a forfeiture of the lands held by them, the Government inspector spent several days talking to individual Indians and procuring their signatures. The Act of March 3, 1893, does not specify that the consent of the Indians had to be obtained "in open council in the usual manner" as had the acts discussed in the fifth and sixth causes of action, and the Commission concluded that the inspector's method of obtaining the consent was a sufficient compliance with the 1893 Act. In view of the fact that the record establishes that the terms of the settlement were explained to and understood by the Indians in open council, we agree that the inspector's method of securing signatures was not illegal or irregular to such a degree as to nullify the effect of the consent. Congress clearly had the right to legislate in this matter for what it considered to be for the best interest of the Indians. The facts of record show that the Government did not benefit in any way from the settlement and that Congress was attempting to secure for the Indians the best terms possible. It is probably true that the situation requiring such a settlement was brought about by the unscrupulous actions of certain individuals and

groups of the Government's white citizens, who consistently brought pressure to bear on certain members of Congress to secure legislation which would benefit their constituents at the expense of the Indians. Their desires, however, were never the desires of the Congress nor of the Department of the Interior. As often happens in a democracy, compromises are sometimes necessary with strong and vocal minorities. In the instant case we agree with the Commission that no unfair or dishonorable motives or conduct can be imputed to the Government in relation to the compromise settlement agreed to by the Indians and the settlers and ratified by Congress for the best interest of the Indians as the best means of bringing to an end the long controversy over the sale of the reservation lands.

On the whole record we find that the Commission's findings and conclusions are supported by substantial evidence and they are affirmed.

Government Appeal from the Decision on Offsets

On December 11, 1953, the Commission made findings of fact and rendered a decision regarding offsets. It concluded that the Government was entitled to offset $23,024.05 from the award made to Indian appellants. The Government has appealed on the ground that the Commission erred in concluding as a matter of law that the United States was not entitled to all offsets claimed by it in its amended answer filed May 29, 1953. The United States claimed offsets in the total amount of $139,038.29.

Subsequent to the filing of the appeal in this case, the Court, on April 6, 1954, issued its decision in

The Quapaw Tribe of Indians et al. v. *United States*, 128 C. Cls. 45, in which the Commission's decision (Docket 14, 1 Ind. Cl. Com. 469) concerning offsets was remanded for further proceedings in accordance with that opinion. In view of the fact that the Commission in the instant case has followed the same general pattern used by it in its decision in the *Quapaw* case, we believe the interests of justice would best be served by remanding to the Commission its findings and decision on offsets herein for further consideration and whatever proceedings may be necessary in accordance with the principles set forth in this court's decision in the *Quapaw* case, *supra*. Accordingly, the Commission's findings and decision on offsets are remanded for further proceedings.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 11

OTOE AND MISSOURIA TRIBE OF INDIANS, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Decided: March 31, 1953

Appearances:

Luther Bohanon, with whom were Bat Shunatona and Bert Barefoot, Jr., Attorneys for Plaintiff.

Ralph A. Barney, John F. Curran, and Cornelius J. McCool, with whom was Mr. Assistant Attorney General Wm. Amory Underhill, Attorneys for Defendant.

Findings of Fact

The Commission makes the following Findings of Fact:

1. The Otoe and Missouria Tribe of Indians is a duly recognized tribe of Indians residing within the territorial limits of the United States, and as such is authorized to maintain this action under Section 2 of the Indian Claims Commission Act (25 U.S.C. 70a).

2. Early in the eighteenth century the plaintiff tribe was located in what is now the southeastern part of Nebraska between the Platte River on the north and the Great Nemaha River on the south. The villages which were occupied by the tribe at various times were all located on the south side of the Platte about 30 to 40 miles above its confluence with the Missouri. The tribe was usually found in only one village when visited by explorers and traders, but this village was not at all times in the same place, being occasionally moved from one location to another in the same vicinity. The tribe continued to occupy its villages in this area and to hunt over the area between the Platte and Great Nemaha Rivers and as far west as the line between Townships 5 and 6 east of the Principal Meridian, and was so occupying and using said area in Indian fashion at the time the United States purchased Louisiana from France in 1803, and at the time of the Treaty of Prairie du Chien on July 15, 1830.

3. The plaintiff tribe also claimed an undefined area east of the Missouri River over which it sometimes roamed and hunted.

A treaty between the United States, the Sioux and Chippewa, Sac and Fox, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, and Potawattomie Tribes, was concluded at Prairie du Chien on August 19, 1825 (7 Stat. 272), for the purpose of promoting peace among said tribes and establishing the boundaries between them and the other tribes living in their vicinity.

Article 4 of said treaty reads as follows:

> The Ottoes not being represented at this Council, and the Commissioners for the United States being anxious that justice should be done to all parties, and having reason to believe that the Ottoes have a just claim to a portion of the country upon the Missouri, east and south of the boundary line dividing the Sacs and Foxes and the Ioways, from the Sioux, it is agreed between the parties interested therein, and the United States, that the claim of the Ottoes shall not be affected by any thing herein contained; but the same shall remain as valid as if this treaty had not been formed.

Article 11 of said treaty provided that a council should be held the following year, 1826, "with the Ottoes, to settle and adjust their title to any of the country claimed by the Sacs, Foxes, and Ioways," but no such council was held, no definite boundary was ever agreed upon, and no definite area lying east of the Missouri River is shown to have been occupied by or recognized as the ex-

clusive property or territory of the plaintiff herein.

4. Differences having arisen among some of the tribes who had been parties to the treaty of 1825 and who resided between the Mississippi and Missouri Rivers in what is now southern Minnesota, Iowa, and northern Missouri, a council of these tribes was assembled at Prairie du Chien, in the month of July, 1830, the purposes of which were to compose the differences and establish peace between said tribes, and to provide other sources for supplying their wants besides those of hunting. This council resulted in the negotiation of a treaty which was concluded on July 15, 1830 (7 Stat. 328), between the United States and the Sacs and Foxes, the Medawah-Kanton, Wahpacoota, Wahpeton and Sisseton Bands or Tribes of Sioux, the Omahas, Ioways, and the Otoe and Missouria.

Article 1 of said treaty reads as follows:

> Article 1. The said Tribes cede and relinquish to the United States forever all their right and title to the lands lying within the following boundaries, to wit: Beginning at the upper fork of the Demoine River, and passing the sources of the Little Sioux, and Floyds Rivers, to the fork of the first creek which falls into the Big Sioux or Calumet on the east side; thence, down said creek, and Calumet River to the Missouri River; thence down said Missouri River to the Missouri State line, above the Kansas; thence along said line to the northwest corner of the said State, thence to the high lands between the waters falling into the Missouri and Demoines, passing to said high lands along the dividing ridge between the forks of the Grand River; thence

along said highlands or ridge separating the waters of the Missouri from those of the Demoine, to a point opposite the source of Boyer River, and thence in a direct line to the upper fork of the Demoine, the place of beginning. But it is understood that the lands ceded and relinquished by this Treaty, are to be assigned and allotted under the direction of the President of the United States, to the Tribes now living thereon, or to such other Tribes as the President may locate thereon for hunting, and other purposes.

This treaty was ratified by the Yankton and Santie Bands of Sioux at St. Louis on October 13, 1830. It was proclaimed February 24, 1831.

5. In addition to the lands ceded by Article 1 of said treaty, the Sacs and Foxes, by Article II, ceded to the United States some 2,000,000 acres extending from the Mississippi to the Des Moines River, and lying south of the boundary with the Sioux as fixed by the treaty of August 19, 1825. The four bands constituting the Sioux of the Mississippi, by Article III, ceded a like area north of said boundary.

The consideration paid and promised to the various tribes for the cessions made in the treaty amounted to between $50,000 and $60,000, of which approximately one-seventh was to go to the plaintiff tribe.

6. At the time of the treaty of July 15, 1830, and for many years prior thereto, the lands described in Article 1 of said treaty were used, occupied and hunted over by a number of Indian tribes, including those who were parties to said treaty, but no one tribe had exclusive possession of any definite

area thereof. The lands ceded by Article 1 comprised a total area of approximately 11,000,000 acres, of which amount 1,900,000 were in Missouri; 9,000,000 in Iowa; and 100,000 in Minnesota. It has not been established in this case that the claimant tribe actually occupied, used or possessed, to the exclusion of other Indian tribes, any part of the lands described in said Article 1.

7 (1). Article I of the treaty of July 15, 1830 recognized the right of the Otoe and Missouria Indians, and of the other tribes who were parties to said treaty, to the common or joint use for hunting and other purposes, of the lands ceded by said article, along with such other tribes as should be designated by the President of the United States.

7 (2). All of the tribes who were parties to the treaty of July 15, 1830, concluded subsequent treaties with the United States wherein they ceded and relinquished whatever rights said Indians had in the area described in Article I of the 1830 treaty. The treaty with the Otoe and Missouria Tribe, in which the Yankton and Santie Bands of Sioux and the Omaha Tribe joined, was concluded October 15, 1836 (7 Stat. 524), wherein the Otoe and Missouria ceded whatever rights they had in the lands between the State of Missouri and the Missouri River, being the part of the lands ceded by Article I of the 1830 treaty.

7 (3). A treaty was negotiated with the Omaha and the Otoe and Missouria Tribes on April 24, 1838, whereby said tribes ceded and relinquished whatever rights had been reserved to them in said lands by virtue of the phraseology of Article I of the said 1830 treaty, but this treaty of 1838 never became effective because of the failure of the

United States Senate to ratify it. Under the later treaty, concluded March 15, 1854 (10 Stat. 1038), the Otoe and Missouria Tribe relinquished to the United States "all claim which they may have heretofore, at any time, set up, to any land on the east side of the Missouri river; * * *."

8 (1). The Otoes and other tribes who were parties to the treaty of July 15, 1830, desired to make provision for their half-breeds, and accordingly procured the insertion of Articles X and XI in said treaty, which read as follows:

> Article X. The Omahas, Ioways and Ottoes, for themselves, and in behalf of the Yanckton and Santie Bands of Sioux, having earnestly requested that they might be permitted to make some provision for their half-breeds, and particularly that they might bestow upon them the tract of country within the following limits, to wit; Beginning at the mouth of the Little Ne-mohaw River, and running up the main channel of said River to a point which will be ten miles from its mouth in a direct line; from thence in a direct line, to strike the Grand Ne-mohaw ten miles above its mouth, in a direct line (the distance between the two Ne-mohaws being about twenty miles)—thence down said River to its mouth; thence up, and with the Meanders of the Missouri River to the point of beginning, it is agreed that the half-breeds of said Tribes and Bands may be suffered to occupy said tract of land; holding it in the same manner, and by the same title that other Indian titles are held: but the President of the United States may hereafter assign to any of the said half-breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section, of six hundred and forty acres to each individual. And this pro-

vision shall extend to the cession made by the Sioux in the preceding Article.

Article XI. The reservation of land mentioned in the preceding Article having belonged to the Ottoes, and having been exclusively ceded by them; it is agreed that the Omahas, the Ioways and the Yanckton and Santie Bands of Sioux shall pay out of their annuities to the said Ottoe Tribe, for the period of ten years, Three hundred Dollars annually; of which sum the Omahas shall pay one hundred Dollars, the Ioways one hundred Dollars, and the Yanckton and Santie Bands one hundred dollars.

8 (2). The half-breeds of the Omahas, Ioways, Yankton and Santie Bands of Sioux, and of the Otoe and Missouria Tribe thus became invested with the title to the tract of land described in Article X. The United States consented to this cession to the half-breeds and thereafter acted as trustee for them, holding and allotting said lands to them, but the record does not show that the United States requested or suggested that the Otoes cede any part of their lands to the half-breeds, but merely acceded to the desire of the Indians and thereafter acted as trustee for the half-breeds, holding and allotting the major portion of the lands to them, and paying them for the shortage in said lands caused by an erroneous survey as set forth in a later finding.

8 (3). Lands to the extent of 93,864.62 acres were allotted and patented to the half-breed Omahas, Ioways, Yankton and Santie Sioux. Patents were also issued to the half-breeds of the Otoe and Missouria Tribe in the same proportion, according to their numbers, as were issued to those of the other

tribes. A total of 389 patents were issued. The plaintiff tribe received the $3,000 which was paid by the other tribes as provided in said treaty. The United States received no profit or benefit from the lands ceded to the half-breeds. The cession to the half-breed was a transaction among the tribes named, at their request.

9. The lands ceded by plaintiff tribe for the use and benefit of the half-breed members of the various tribes as set out in the preceding findings were surveyed in 1838 by John C. McCoy, who had been employed and authorized by the defendant herein to make said survey. This survey was erroneous in that it failed to place the western boundary of the cession as far west as was provided in the treaty. This error caused the reservation, as surveyed, to contain 15,697 acres less than the area called for by the treaty. This error was disclosed by a resurvey of the reservation in 1855, while making preparation for its allotment to the half-breeds. By the act of June 12, 1858 (11 Stat. 319), the line surveyed by McCoy as the western boundary of the half-breed tract was declared to be and was established as the true western boundary of said tract. By the act of February 28, 1859 (11 Stat. 401), Congress authorized an adjustment of the claim of the half-breeds for the shortage of land which resulted from the erroneous survey and directed that they should be compensated at the rate of $1.25 per acre for such deficiency. Thereafter, by act of March 3, 1863 (12 Stat. 792), Congress appropriated the sum of $19,621.27, which was $1.25 per acre for the 15,697 acres which had been excluded from the half-breed reservation by the erroneous survey of McCoy. The half-breed In-

dians received allotments of all the lands included in their reservation as surveyed by McCoy, and were paid for that part of the land described in the treaty but which had not been included in said survey—that is, the 15,697 acres.

10. The land ceded by the Otoe and Missouria Indians to the half-breeds by the treaty of July 15, 1830, was at the time recognized and acknowledged by all the parties to said treaty as belonging to the Otoes and as being exclusively ceded by them. This tract was further from the villages of the Otoes than the lands ceded by treaty of September 21, 1833, or by treaty of March 15, 1854. The lands ceded by the treaty of 1833 adjoined the half-breed reservation on its west. The lands ceded by the treaty of 1854 lay between the northern boundary of the 1833 cession and the Platte River in Nebraska.

11. By a treaty concluded September 21, 1833 (7 Stat. 429), the Otoe and Missouria Tribe ceded and relinquished to the United States a tract (boundaries according to stipulation of the parties filed herein) containing 792,000 acres:

> Commencing at the Northwest Corner of the Nemaha half-breed reservation as described in Article X of the Treaty of July 15, 1830, as the point of beginning; thence up the Little Nemaha River to the Southeast corner of Section 24, Township 10 North, Range 8 East of the Principal Meridian; Thence on a direct line West to the Range Line lying between Range 5 East and 6 East of the Principal Meridian; thence South on said Range Line to the Great Nemaha River; thence down said Great Nemaha River to the Southwest corner of the Nemaha half-breed reservation as defined in Article X of the Treaty of July 15, 1830, to the point of beginning.

The United States has paid the Otoe and Missouria Tribe the sum of $39,410.15 under the provision of said 1833 treaty.

12 (1). By the treaty of March 15, 1854 (10 Stat. 1038), the Otoe and Missouria Tribe relinquished all claim which they had theretofore at any time made to any land on the east side of the Missouri River; and also by Article I of said treaty ceded to the United States all their remaining lands west of the Missouri River,

> * * * excepting a strip of land on the waters of the Big Blue River, ten miles in width and bounded as follows: Commencing at a point in the middle of the Main branch of the Big Blue River, in a west or southwest direction from Old Fort Kearney, at a place called by the Indians the 'Islands;' thence west to the western boundary of the country hereby ceded; thence in a northerly course with said western boundary, ten miles; thence east to a point due north of the starting point and ten miles therefrom; thence to the place of beginning: *Provided,* That in case the said initial point is not within the limits of the country hereby ceded, or that the western boundary of said country is not distant twenty-five miles or more from the initial point, in either case, there shall be assigned by the United States to said Indians, for their future home, a tract of land not less than ten miles wide by twenty-five miles long, the southeast corner of which tract shall be the initial point above named. And such portion of such tract, if any, as shall prove to be outside of the ceded country, shall be and the same is hereby granted and ceded to the confederate tribes of Ottoe and Missouria Indians by the United States, who will have said tract properly set off by durable monuments as soon after

the ratification of this instrument as the same can conveniently be done.

12(2). On December 9, 1854, a treaty (10 Stat. 1130) supplementary to the foregoing treaty of March 15, 1854, was concluded between the United States and the Otoe and Missouria Tribe wherein it was recited that, upon exploration by the tribe of the reservation provided by the March 15, 1854 treaty, it was found that they had been mistaken as to the location thereof and that the larger portion—nearly the entirety—of it was to the west of the Big Blue River, was without sufficient timber, and they were dissatisfied. To remove all cause of complaint, it was agreed that the initial point of the reservation (in lieu of that stated in the March 15, 1854 treaty) should be a point five miles due east thereof, thence west twenty-five miles, thence north ten miles, thence east to a point due north of the starting point and ten miles therefrom, thence to the place of beginning; and that the country embraced within said boundaries should be taken and considered as the reservation and home of said tribes in lieu of that provided for them and described in the prior 1854 treaty. This entire area so described was outside the area of the cession made in the March 15, 1854 treaty.

12(3). The parties hereto have filed a formal stipulation and agreement fixing the boundaries of the cession made under the March 15, 1854 treaty, and establishing the acreage contained therein as 1,250,000 acres. The reservation provided in the aforesaid treaties, when surveyed, was found to contain 162,107.71 acres. The total consideration paid under and by virtue of the pro-

visions of the treaty of March 15, 1854, for the cession and relinquishment was $463,423.74. There is no evidence from which it can be determined what amount, if any, was in payment for the relinquishment of the claim of the Indians to the lands east of the Missouri River. At the time, the game in this area had been practically exhausted and was of little value. The United States assigned this land east of the Missouri River to the Potawattomie Tribe of Indians for a home under the treaty of September 26, 1833 (7 Stat. 431), and it was thereafter occupied by that tribe until settled by the whites.

13. At the time of the treaties of September 21, 1833, and March 15, 1854, no other Indian tribe or band was occupying or using or claiming the lands which were ceded by said treaties, and the neighboring tribes recognized said lands as the rightful and exclusive hunting grounds of the Otoe and Missouria Indians.

Commissioner Ellsworth, who negotiated the treaty of September 21, 1833, in his report on said treaty to the Commissioner of Indian Affairs, stated that he had found the Indian title to the land ceded to be good in the Otoe and Missouria Indians. The eminent historian, Dr. B. B. Chapman, who has made a special study of the Otoe and Missouria Tribe, says that the Otoe and Missouria Tribe possessed the area ceded by them in the treaty of 1833 to the exclusion of all other tribes; that no other Indian tribe or tribes claimed any part of this area; and that the adjoining tribes recognized and respected the Otoe and Missouria ownership thereof.

In his work entitled "An Introduction to Pawnee Archeology," Dr. Ralph Waldo Wedel says:

> * * *. On the east the Omaha controlled a large area north of the Platte from Shell Creek to the mouth of the Niobrara, and south of the Platte the Oto claimed as theirs the lands lying east of the Big Blue and north of the Big Nemaha. * * *

Early explorers, Charlevoix in 1821, Choteau in 1816, Major Long in 1820, placed the plaintiff tribe as the exclusive users in Indian fashion of the territory ceded by the treaties of September 21, 1833, and March 15, 1854.

George W. Manypenny, Commissioner of Indian Affairs, reporting to the Secretary of the Interior on the date of November 26, 1853, quotes James M. Gatewood, Indian Agent, as saying in his report of October 16, 1853, among other things, that "the Otoe and Missouria, a confederated tribe that owned the country on the west side of the Missouri and extending from the Great Nebraska (Platte River) to the Little Nemaha have been reduced by a combination of circumstances over which they have no control to a state of poverty and suffering, etc. * * * These Indians have been induced of late years to rely less upon hunting and more upon the products of the soil for their support. With that object in view, they concluded a treaty on the 31st day of September, 1833, with the United States, for the sale of a large and valuable tract of country lying to the south of the Little Nemaha, and westwardly to their western boundary."

14. The tract ceded under the treaty of Septem-

ber 21, 1833, as described in Finding 11, contains 792,000 acres of land for which the Indians received the sum of $39,410.15—being 4.9 cents per acre. We find that this land had a value of 75 cents per acre at the date it was ceded to the United States on September 21, 1833. The consideration the Otoe and Missouria Tribe received for said land was grossly inadequate and constituted an unconscionable consideration.

15. The tract of land west of the Missouri River ceded by the Otoe and Missouria Tribe to the United States under the treaty of March 15, 1854, contained 1,250,000 acres (Finding 12(3)); the area reserved by the plaintiff tribe in said treaty proved to be located outside of the ceded area, and the area supplied by the defendant for the reservation constituted 162,107.71 acres. By reason thereof, the defendant received by the cession a net of 1,087,892.29 acres of land from the Otoe and Missouria Tribe.

16. The Commission finds the value of the land ceded by the 1854 treaty to have been $1.00 per acre at the time of the cession, or $1,087,892.29.

17. The plaintiff tribe received the total sum of $463,423.74 from the United States under and by virtue of the provisions of the March 15, 1854 treaty. This sum may not, in a strict sense, be so grossly inadequate as to constitute an unconscionable consideration for the land ceded by the treaty; however, taking into consideration all the facts and circumstances as disclosed by the record, the payment by the defendant of such an inadequate consideration for the ceded land and relinquishment of all rights in land east of the

Missouri River was unquestionably unfair and resulted in an injustice to the plaintiff tribe.

18. Sale of 120,000 acres of plaintiff's reservation was authorized by act of Congress of 1876 (19 Stat. 209). F. M. Barnes, a member of plaintiff tribe, was appointed one of the appraisers at the request of the tribe to evaluate the land to be sold. The Secretary of the Interior appointed two others as appraisers.

The lands selected for sale aggregated 119,846.17 acres and were appraised as having the value of $427,091.33, or $3.56 an acre. The sum of $462,-262.73 was received by the Otoe and Missouria for this tract, or approximately $3.85 per acre.

19. By act of Congress of March 3, 1881 (21 Stat. 380), authorization was granted for the appraisal and sale of the remainder (being 43,051 acres) of the plaintiff's reservation. On May 4, 1881, the Otoe and Missouria Indians in council agreed to the sale of said remainder of said reservation and again appointed Francis M. Barnes as the appraiser to represent the Indians. The 43,051 acres were duly appraised as of the value of $258,-276.10, or an average of $6.08 per acre, of which 42,261.54 acres were sold for the aggregate sum of $516,851.52, or an average of $12.22 per acre.

20. The appraisal and sale of the lands hereinabove described were fairly performed and the interests of the Indians protected by Francis M. Barnes, the appraiser chosen by the Indians to represent them, and by the agents of the defendant.

21(1). The act of March 3, 1881 (21 Stat. 380), authorizing sale of the remainder of plaintiff's reservation lands was approved by the Indians

on May 4 of the same year. Although this act contained no provision directing the sale to be made at public auction, the Commissioner of Indian Affairs recommended that the lands be sold upon deferred payments as per terms of the act, and "to the highest bidder who is a qualified purchaser." This recommendation was adopted by the Secretary of the Interior, who instructed the Commission of the General Land Office to proceed with the sale after due advertisement to the highest responsible bidder upon deferred payments in accordance with the provisions of the act of 1881. The lands were to be sold in tracts not exceeding 80 acres each, and no purchaser could purchase more than 160 acres. No lands could be sold at less than the appraised value. The purchaser was required to pay one-fourth in cash and the remainder in three annual payments with interest thereon at five per cent per annum.

21(2). In accordance with these instructions, the sale was set for May 31, 1883, and was advertised in a number of newspapers in eastern Kansas and Nebraska. The sale attracted large crowds and the bidding was spirited. The land had been appraised at an average of $6.08 per acre and was sold at an average of $12.22 per acre. About half of those who were the high bidders at this first sale failed to comply with requirements of the Land Office, and a second sale was advertised for December 10, 1883, at which the successful bidder was required to make payment of one-fourth of the purchase price upon acceptance of his bid.

21(3). Many of the purchasers failed to make their payments of principal and interest when the

first of their deferred payments fell due, and began to petition Congress for extensions of time and other forms of relief, alleging that the lands had been sold for more than they were worth, and that they had been promised relief from excessive prices at the time of their purchases.

21(4). By act of March 3, 1885, the Congress extended the time for making final payments for a term of two years. Again, by the act of August 2, 1886, the Congress granted an additional extension of two years. Both of these acts were passed without consulting the wishes of the Indians. These two extensions, taken together, ran to April 30, 1889. The act of August 2, 1886, provided that the interest then due on the deferred payments should be paid annually "at the time said payments are now due." However, nearly 12 years later, there were 124 purchasers who were in default, only 24 of whom had paid any interest whatever.

22(1). By the act of March 3, 1893 (27 Stat. 568), the Congress authorized and directed the Secretary of the Interior to adjust the amounts due by the purchasers by allowing rebates of the amounts paid or agreed to be paid by them which were in excess of the appraised value of the lands purchased by them, "the consent of the Indians having first been obtained." The Indians were convened in council on January 3, 1895, by Commissioners appointed to obtain their consent, but refused to agree to any rebate whatever from the amounts for which their lands were originally sold. The Land Office at Lincoln, Nebraska, at the direction of the Secretary of the Interior, notified the delinquents that they would be granted

90 days in which to pay the principal and interest due by them, or have their entries cancelled. Shortly thereafter, on November 9, 1895, the Secretary of the Interior directed the General Land Office to take no further action looking to the cancellation of the entries.

22(2). In the year 1896 strenuous efforts were continued, both in and out of Congress, to devise some plan of settlement to satisfy the purchasers which the Indians would accept. These efforts resulted in a proposition of settlement by which only the settlers who were in default should have 10 years' interest rebated if they would pay the balance due by them in 90 days. This proposition was accepted by the Indians in council on June 3, 1896, and signed by a majority of the tribe. On December 20, 1896, the Assistant Attorney General ruled that if this proposed rebate should be granted to the purchasers who were in default, that a like rebate would have to be granted to those purchasers who had already paid in full. Following this ruling, bills were introduced in Congress providing for rebate to the purchasers of all money paid or contracted to be paid for the lands in excess of the appraised values as determined in 1883. This bill was passed in the Senate on February 11, 1898, over the vigorous protest of the Office of Indian Affairs, but was finally defeated in the House of Representatives.

22(3). On February 20, 1899, the House Committee on Indian Affairs introduced a bill providing for certain rebates and deductions, on which the Indians were to be heard, but which did not require their consent.

22(4). While this bill was still pending, attor-

neys for the purchasers presented a new proposition to the Secretary of the Interior, the terms of which were all for the benefit of the purchasers. This proposition was submitted to the Indians on August 11, 1899, and was by them rejected. They then addressed a vigorous letter to the Secretary of the Interior, protesting the granting of extensions and rebates, and calling attention to the fact that all the extensions given the purchasers by Congress had been granted without the consent of the Indians.

22 (5). After the Indians had rejected the above proposal, Secretary of the Interior Ryan, in September, 1899, directed Indian Inspector James McLaughlin to negotiate with the purchasers in an effort to have them submit an offer to which the Indians would give their consent. McLaughlin entered into negotiations with the purchasers who were in arrears and ultimately secured from them a proposal to pay the appraised value of their lands, plus one-fourth of the net value, with simple interest at five per cent per annum on the adjusted price from date of purchase, credits to be given for all payments made by the purchasers with interest from the dates of such payments.

22 (6). Inspector McLaughlin then proceeded to the submission of such proposal to said Indians. He called a council of the Indians for November 20, 1899, and presented this proposed compromise settlement to them, fully explaining through Interpreters Shunatona and Dervin, both members of the tribe. The Indians did not ratify the proposed settlement at their first meeting, and McLaughlin called them into council from day to day

for several days. The document accepting the proposed settlement was ultimately signed by 73 of the 88 adult male members of said tribe.

22 (7). The Congress, by the act of April 4, 1900, approved and confirmed the above settlement as a revision and adjustment of the sales of the late reservation of the Otoe and Missouria Tribe of Indians. It has been stipulated herein that this settlement resulted in a rebate to the delinquent purchasers in the amount of $168,784.08, which was due the Indians on July 1, 1900, on basis of original sales contracts.

22 (8). Inspector McLaughlin, in transmitting said proposed settlement to the Secretary of the Interior, wrote in his letter of December 9, 1899, with reference to the same, as follows:

> The price at which the lands were bid in at the time of sale was, in most instances, very high and undoubtedly much above the market value of wild lands in that section of country at the time, and as the proposition of the settlers for a compromise settlement has been accepted by the Indians as per the enclosed Agreement, and the purchase price agreed upon for the lands of the delinquent purchasers being, in my opinion, a fair and reasonable compromise settlement, giving the Indians good value for the lands and equitably adjusting the cost of same to the settlers, and which will end this long standing and perplexing matter, I therefore respectfully recommend approval of the Agreement.

22 (9). Senator Hitchcock, Chairman of the Senate Committee on Indian Affairs, recommended the approval of this settlement to Congress, and

on March 12, 1900, the bill passed the Senate, without debate, and thereafter passed the House on April 4 by vote of 104 to 13. Dennis T. Flynn, a delegate from Oklahoma Territory, in whose district the Otoe and Missouria Indians were then living, urged the passage of the bill, stating, among other things, "If we hang up this settlement it is uncertain whether the Indians will ever get the money."

22 (10). In a letter to the Secretary of the Interior of date May 15, 1912, James McLaughlin, the Indian Inspector, stated that said settlement proposal was fully discussed in his presence by a delegation of Otoe and Missouria in December, 1899, and that the delegates expressed their full concurrence therein, and he again stated that the Indians had entered into the compromise settlement with full knowledge and consent after a thorough understanding by them of the provisions thereof.

22 (11). Approximately one-half of the signers of the compromise settlement understood the English language and themselves signed their names thereto, among them being Richard W. Shunatona, who had been selected by the Indians as their special interpreter, and Mitchell Dervin, the official interpreter, both being members of the tribe. They also signed a certificate to the instrument certifying that they had fully and carefully interpreted all that passed between the Indian Inspector (McLaughlin) and said Indians, and that the Indians thoroughly understood the nature of the subject matter in controversy; and that the Indians had signed same of their own free will and volition.

23. We find that the terms of the compromise

settlement of November 20, 1899, were understood by the Indians, and that they executed the same of their own free will and volition.

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 11

OTOE AND MISSOURIA TRIBE OF INDIANS, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Decided: March 31, 1953.

Appearances:

Luther Bohanon, with whom was Bat Shunatona and Bert Barefoot, Jr., Attorneys for Plaintiff.

Ralph A. Barney, John F. Curran, and Cornelius J. McCool, with whom was Mr. Assistant Attorney General Wm. Amory Underhill, Attorneys for Defendant.

OPINION OF THE COMMISSION

WITT, Chief Commissioner, delivered the opinion of the Commission.

This case involves seven claims presented by the Otoe and Missouria Tribe of Indians, which are separately treated and will be separately considered.

First Cause of Action

This cause of action is based on a claimed undivided interest of approximately one-seventh in the

lands lying east of the Missouri River, principally in the territory now part of the State of Iowa, ceded by treaties to which plaintiff was a party, dated July 15, 1830 (7 Stat. 328), October 15, 1836 (7 Stat. 524), and March 15, 1854 (10 Stat. 1038). Plaintiff's interest is alleged as being approximately 2,322,285 acres of the average reasonable market value of $1.25 per acre; plaintiff alleging that the consideration received by it by said cession was a total of $64,682.78, or 2.8 cents per acre. This consideration, it alleges, was unconscionable, and it sues for the difference between the alleged value and the amount received. The land involved is tract 151 on Royce's Map of Iowa No. 1.

Plaintiff claims, if not Indian title jointly with the other plaintiffs, at least a bona fide "right of occupancy and use for hunting purposes." The initial question to be considered is the title, if any, of the plainitff to the lands claimed. In this connection, it is to be noted that there is no substantial proof of the actual occupancy by the plaintiff tribe at any time of any definitely described portion of the land in which it claims an undivided interest. The most that can be said of the proof is that the plaintiff tribe did some hunting on some portions of the territory.

Early in the Eighteenth Century the plaintiff tribe was located in what is now the southern part of Nebraska, between the Platte River on the north, and the Great Nemaha River on the south. The villages which were occupied by the tribe at various times were all located on the south side of the Platte about 30 to 40 miles above its confluence with the Missouri. The tribe was usually found in only one

village when visited by explorers and traders, but this village was not at all times in the same place, being occasionally moved from one location to another in the same vicinity. The tribe continued to occupy its villages in this area and to hunt over the area between the Platte and the Great Nemaha Rivers, west of the Missouri River, and was so occupied in using this area in Indian fashion at the time of the Louisiana Purchase, and at the time of the treaty of July 15, 1830.

While the plaintiff tribe also claimed an undefined area east of the Missouri River over which it sometimes roamed and hunted, we find no actual occupancy or claim of the right of possession to any defined area east of the Missouri River. Therefore, this Commission holds that the plaintiff tribe has not established Indian title to any of the lands claimed as a basis for its First Cause of Action. Said tribe at most only had hunting rights to be exercised jointly with other tribes over an undefined area east of the Missouri, and the value of these hunting rights was growing less and less as the buffalo and other game disappeared, and the Commission, even granting ownership of such rights, is unable to determine their value, or that the compensation received therefor was not adequate or was unconscionable; or that the plaintiff has been unfairly treated.

The First Cause of Action must therefore be dismissed.

Second Cause of Action

This Cause of Action is based on Article X of the treaty of July 15, 1830. In this article there is set aside a tract of land west of the Missouri River

and bounded on the east by said river, and lying between the Little and the Great Nemaha Rivers (being Royce's Plat 155 of Nebraska), comprising 143,647.33 acres, to the half-breeds of the plaintiff tribe and of other tribes. The treaty recites that the acreage so set aside to said half-breeds belonged at the time to the plaintiff tribe, and the plaintiff tribe alone of the tribes making the cession was paid for said lands the sum of $3,000, or 3.26 cents per acre. Of the lands so ceded, 93,864.62 acres were allotted to half-breed members of tribes other than the plaintiff tribe. Plaintiff contends that it owed no duty to the half-breeds of the other tribes and that the defendant, as the guardian of the plaintiff, owed the plaintiff the duty of preventing it from disposing of its lands at such a price, and that it should have a judgment against the defendant for the difference between the then fair actual value of the said 93,864.62 acres allotted to the half-breeds of tribes other than half-breeds of its own tribe and the consideration actually received by it for said lands.

Growing out of this same cession, plaintiff also asserts a cause of action for the difference in the amount received and the fair market value, at the time, of 15,697 acres which plaintiff alleges the defendant failed by error in surveying to allot to the half-breeds.

Plaintiff alleges that at the time of the cession, the value of the 93,864.62 acres was $2.50 per acre, and that of the 15,697 acres was $4.82 per acre.

The article of the treaty making this cession recites that the Omahas, Ioways and Ottoes, for themselves, and in behalf of the Yanckton and Santie

Bands of Sioux, having earnestly requested that they might be permitted to make some provision for their half-breeds, are conveying the land involved to said half-breeds. It is apparent that the defendant neither suggested that this cession be made for the benefit of these half-breeds or what the consideration moving to the tribe for such conveyance should be. There was no profit or benefit of any kind moving to the defendant by reason of such conveyance to these half-breeds. We find that the Indians were intelligent enough to know what they were doing and that they were not improperly influenced in any way in the making of such provision for half-breeds. This Commission does not think the duty of the defendant warranted its interference in this transaction of these tribes with each other; nor that the plaintiff can require, just because the defendant stood by and did not interfere with the transaction, that it should be held liable to the plaintiff when it (the defendant government) was not profiting in any way by the transaction.

With reference to the question of liability of the defendant for its failure to convey 15,697 acres to these half-breeds because of an erroneous survey, Congress is shown to have made an appropriation of $19,621.27, which was $1.25 per acre for the 15,697 acres which the half-breeds failed to get, and that this money was paid to them in lieu of the lands which they did not receive. The plaintiff tribe had made an outright cession of these lands for the benefit of their half-breeds, and when the half-breeds were reimbursed for the loss of this acreage as to which complaint is made, it would

seem that the liability of the defendant for its error had been discharged.

This Commission cannot sustain the contention of plaintiff that defendant has not fully discharged its obligation growing out of this erroneous survey.

Both claims, therefore, under the Second Cause of Action must be dismissed.

Third Cause of Action

This Cause of Action is based on the cession of 807,456.49 acres of land made by the treaty of September 21, 1833. By stipulation this acreage is reduced and fixed as 792,000 acres.

Plaintiff contends that it had Indian title to the land ceded; that the land had a true value at the time of the cession of $1.50 per acre; that the consideration of $39,510.15, or 4.9 cents per acre received by plaintiff for the cession was unconscionable and not fair, and plaintiff should receive an award for the difference between what it was worth and what it received therefor, together with 5 per cent interest thereon from the date of the treaty.

The first question to be decided is whether or not the plaintiff has established by satisfactory evidence the aboriginal possession and ownership of the land involved.

In this connection, attention is called to the reports by Charlevoix in 1721, by Choteau in 1816, and by Major Stephen H. Long in 1820, all of whom place the plaintiff tribe in occupancy of different villages on the tract involved. No other tribe contested the occupancy in Indian fashion or the claim of ownership of plaintiff tribe of any part of the

entire acreage involved at these dates. The eminent historian and researcher, Dr. Waldo Wedel and his wife, Mrs. Wedel, and B. B. Chapman, Professor of History at Oklahoma A. & M. College, all confirm the exclusive use and occupancy by plaintiff of the tract involved herein, and probably somewhat further west and south. Dr. Chapman was positive in his testimony that from his study of this tribe it possessed the area ceded in 1833 to the exclusion of all other tribes; that no other Indian tribe or tribes claimed any part of this particular area; and that the adjoining tribes recognized the Otoe and Missouria ownership and possession thereof. The treaty involved was negotiated for the United States government by Henry L. Ellsworth and he reported to the Secretary of the Interior with reference to the lands described in the treaty—"I find the Indian title in said lands good."

As confirmation of the generally recognized ownership of this land by the plaintiff tribe, attention is also called to the admitted ownership by the plaintiff tribe on the part of the United States to the lands ceded by the 1830 treaty to the half-breeds, in which treaty of cession (July 15, 1830, 7 Stat. 328; Art. XI) the ownership of the lands ceded to said half-breeds is stated as being in the plaintiff tribe. This tract is Plat 155 of Nebraska by Royce, and lies immediately east of the 1833 cession, and is further removed from the villages of the plaintiff tribe just south of the Platte River than most of the 1833 cession, and further than any part of the 1854 cession discussed later herein upon which plaintiff's Fourth Cause of Action is based. As will be pointed out in a discussion of the Fourth Cause of Action,

which involves lands to the north of the cession of 1833, approximately 42 cents per acre was paid the plaintiff tribe for said cession of 1854, which price can hardly be considered as compensation for only a quitclaim, rather than for recognized Indian title. This is very persuasive of the ownership also of the lands ceded in 1833 involved in this Cause of Action, because as stated, this 1833 cession lies largely between the cession of 1854 and the previous cession of 1830 to the half-breeds of lands recognized as owned by the plaintiff tribe.

Based upon the proof held necessary to establish Indian title as made by this Commission in previously decided cases, we are of the opinion that Indian title to the land in this Cause of Action has been established.

The next question to determine is whether or not the consideration received by plaintiff tribe for the cession was unconscionable or so grossly inadequate as to be unfair and unjust. It is undisputed that the consideration paid for the cession was $39,410.15, that is, 4.9 cents per acre. The evidence of value consists of the testimony and research of Dr. Thomas E. LeDuc, Research Professor, Department of History, University of Nebraska, a witness for the plaintiff, and Mr. John Muehlbeier, an Agricultural Economist of the Bureau of Agricultural Economics, Department of Agriculture, a witness for the defendant. The lands of this cession were not put on the market by the defendant government until 1859; much of it was sold at the ceiling price of $1.25 to actual settlers, and the only sales in evidence are sales of smaller tracts in nearby states. Based on these sales, Dr. Le Duc

contends that the land should be valued at $1.50 per acre as of the date of the cession. Mr. Muehlbeier places a value of 15 cents an acre on the land as of 1833. It is conceded that the lands had no actual market value in tracts of the size involved at the time of the cession.

We find that the 792,000 acres involved in this cause of action had a fair actual value at the time of the cession of 75 cents per acre, or a total of $594,000.00.

Applying the principles and reasoning as to the determination as to whether or not a consideration is unconscionable, as previously held by this Commission and the Court of Claims, we decide that the consideration paid for the land involved herein was unconscionable and that plaintiff is entitled to an award in the amount of $594,000.00, less $39,410.15 paid under the provisions of the cession, that is, $554,589.85, less such offsets, if any, as may hereinafter be allowed in accordance with Section 12 of the General Rules of Procedure of this Commission.

Fourth Cause of Action

This Cause of Action is based on the treaty of March 15, 1854, which ceded 1,250,000 acres (acreage and boundaries stipulated), west of the Missouri River, together with any remaining claims the plaintiff tribe might have east of the river. The plaintiff claims Indian title to the land west of the river ceded and sues for additional compensation therefor based on the contention that the amount received under the terms of the treaty was much less than the fair value of the land ceded at the time, and was unconscionable. It is undisputed that the

money consideration for the cession was $463,-423.74. The treaty also grants to the plaintiff a reservation in lands owned by the government in the amount of 162,107.71 acres in Kansas and Nebraska, which tract was located some miles to the south of the tract ceded, so that the net acreage ceded to defendant was 1,087,892.29 acres.

The proof of possession and exclusive occupancy by plaintiff tribe of said ceded tract is substantially the same as that of the tract ceded in 1833, upon which treaty and cession the Third Cause of Action is based. Therefore, we are of the opinion that possession and exclusive occupancy of the land involved has been established; or if not established, that such ownership was recognized by the defendant for the reasons set forth in the discussion of the Third Cause of Action, and for the further reason that it is hardly conceivable that any such consideration as was given the plaintiff tribe for this cession would have been given for a mere quit-claim, or in the absence of recognized ownership. As heretofore stated, the consideration in money for the net acreage of 1,087,892.29 acres ceded was $463,423.74, being approximately 42 cents per acre. While said treaty also ceded whatever remaining rights the plaintiff tribe had in territory east of the Missouri River, those rights were only hunting rights, the value of which are little, if anything, because the game at the time of the cession had largely, if not wholly, disappeared; and in 1833 the area was occupied by the Potawattomie Tribe to whom said land had been ceded by the United States.

The proof of value of the tract ceded as in the Third Cause of Action consists almost wholly of the

testimony and research of Dr. Thomas E. Le Duc, a witness for the plaintiff, and Mr. John Muehlbeier, a witness for the defendant. The lands involved in this tract include more valley acreage because of the extensive frontage on the Platte and Missouri Rivers; and this frontage also provides for the tract an easier approach from the states to the east, to-wit, Iowa and Missouri, which were in 1854 rapidly being settled by the whites, together with better transportation facilities than the acreage involved in the Third Cause of Action. The value of this acreage must also be made as of a later date than that involved in the Third Cause of Action, after more development and increased demand for these lands had come about. Based upon his research, Dr. Le Duc contends that the land had a value as of the date of the cession of $3.165 per acre. Mr. Muehlbeier places the value at 45 cents per acre.

We find that the 1,087,892.29 acres involved in this Cause of Action had a fair actual value at the time of the cession of $1.00 per acre, or a total of $1,087,892.29.

While the difference between the value of the land involved, as we find it, and the consideration received for it, might not make the compensation received unconscionable, yet under the facts and circumstances said consideration was so inadequate as to be unfair and work an injustice to the plaintiff tribe. Therefore, the Commission finds that the plaintiff is entitled to an award in the amount of $624,468.55, (being the difference between the $463,423.74 received for the land, and its value of $1,087,892.29), less such offsets, if any, as may here-

after be allowed in accordance with Section 12 of the General Rules of Procedure of this Commission.

Fifth and Sixth Causes of Action

These two causes of action are based on the contention that lands, the ownership of which is acknowledged to have been in the plaintiff, were under acts of Congress sold for the benefit of the plaintiff, and that the consent of plaintiff to said sales was secured by duress, and that the selling procedures were at variance with the provisions of the acts of Congress providing for such sales, and the consideration received therefor, as compared with the value of the lands at the time, which plaintiff alleges was $7.53 per acre, was unconscionable; or in any event, the defendant was guilty of unfair and dishonorable dealings; and that plaintiff should recover the difference between the value of the lands and the amount plaintiff received therefor.

The 119,846.17 acres of lands involved in the Fifth Cause of Action, appraised as having the average value of $3.56 per acre, were sold for a total of $462,262.73, which was $3.85 per acre. We do not think that the difference between the alleged value, if we so found such value (which we do not), and the amount received, would make the price received unconscionable; and the fact that the lands were sold for the amount at which they were appraised at the time by three appraisers, one of whom was selected by the Indians themselves, would indicate fair and honorable dealings. In this connection, it is significant that the same appraiser selected by the Indians to appraise the land involved in this sale was, a few years later,

selected by the Indians as their appraiser of the value of the lands from the sale of which arises the Sixth Cause of Action. The Indians during this time were receiving substantial annuities from the Federal Government and we are of the opinion that the evidence does not justify a finding that the agreement providing for the sale of these lands was secured by duress.

The Sixth Cause of Action is based on the sale of the remainder of plaintiff's reservation, to-wit, 42,261 acres, the sale of which was provided for by act of Congress of March 3, 1881. These lands were sold for an approximate average of $12.22 per acre, which was twice their appraised value. The plaintiff contends that the fair actual value at the time of sale was $15.23 per acre. We are of the opinion that the difference in value between the lands and the price for which they were sold, if there was the difference claimed (which is not admitted), would not warrant a finding that the consideration received was unconscionable, nor would the sale or the methods of sale justify a finding of unfair and dishonorable dealings.

As stated, we are of the opinion that the consent of the plaintiff was properly and fairly secured to the sales involved in these two causes of action and was not due to duress, and that there were no irregularities or procedures at such variance with the acts of Congress providing for such sales as to invalidate the same; however, even though duress and selling irregularities occurred, the defendant had the legal authority to sell this land without the consent of the Indians and upon its own terms and conditions, subject only to liability for dam-

ages that may have been sustained by the Indians through such action of the defendant.

Since the selling of said land was thought by the defendant to be in the best interest of the Indians, and was marketed in a manner that was thought to be fair and with a proper regard for the interest of the Indians, and for the first tract sold there was received by the Indians a slight increase over the appraised value of the land, and in the second sale there was received more than twice the appraised value of the land, it is thought all the duty owed by the defendant to the plaintiff was discharged fairly and honorably, and that no liability was incurred to the plaintiff regardless of whether or not there was duress in the securing of plaintiff's consent to the selling, or a variance in the method of selling to that prescribed by the statutes providing therefor.

Therefore, both the Fifth and Sixth Causes of Action should be dismissed.

Seventh Cause of Action

This Cause of Action is based on the contention of plaintiff that a compromise settlement dated November 20, 1899, between the plaintiff Indians and certain delinquent purchasers of lands previously owned by the plaintiff and a part of their reservation in Kansas and Nebraska, under the terms of which $168,784.08 (a stipulated amount), then due and owing by these purchasers should be "forgiven," was of no binding effect because it was secured by duress and fraud, based on no existing law authorizing the same, was due to neglect on the part of the defendant government

as guardian of the plaintiff, its ward; and that plaintiff should have a judgment against the defendant for said $168,784.08, and interest.

Long prior to the execution of this instrument there had been default in payment by many purchasers of land previously owned by the plaintiff tribe in Kansas and Nebraska, and these purchasers at the time of the execution of said instrument were in default to the extent of $288,583.08 and had for many years been making the contention that misrepresentations had been made to them at the time they purchased the lands; that prices they were induced to bid on said lands were far in excess of their value at the time, and that in justice and equity some readjustment of their contracts of purchase should be made and they should be granted some rebates or reductions thereon. By act of Congress of March 3, 1893 (27 Stat. 568) the Secretary of the Interior was authorized to revise the sales involved, "the consent of the Indians having first been obtained," by allowing to the purchasers rebates on amounts paid or agreed to be paid. The nature of these rebates remained in controversy until the compromise settlement of November 20, 1899 was entered into. This proposed settlement was thereafter ratified by Congress by act of April 4, 1900 (31 Stat. 59). The vote by which the House of Representatives approved this settlement was 104 to 13, and Dennis T. Flynn, a delegate from Oklahoma Territory in whose district the Indians were then living, urged the passage of the bill approving the settlement, stating among other things, "If we hang up this settlement it is uncertain whether the Indians will ever get the money."

While there is evidence that this compromise settlement was executed in an irregular way by the tribe and not in formal council—we do not think that such evidence is sufficient to discredit the document as a voluntary and binding waiver on the part of the Indians of the amount therein involved. The document provides for the acceptance by the Indians of a proposition made by the delinquent purchasers by a recasting of their purchase contracts so as to make provision for a sale of the lands involved at the appraised value plus 25 per cent thereof, plus annual interest at the rate of 5 per cent per annum from the time of their purchases, and for immediate payment of the purchase price on the basis of such revised sales price. This instrument involved a reduction of the purchase price in the amount of $168,784.08 (a stipulated amount).

This proposed settlement was submitted to the Indians a few days before its actual execution, by James McLaughlin, the United States Indian Inspector, a man referred to by the plaintiff in its brief as a "reliable" trouble-shooter. McLaughlin, immediately after the execution of the instrument, and many times thereafter, with reference to the circumstances of its execution, stated that it was fully explained to the Indians and that they signed the same with full knowledge and understanding of its contents. We find that there was no ulterior motive on the part of said McLaughlin actuating him in his activities or his statements, and nothing to reflect upon him as a man of honor and integrity.

Congress thereafter, as stated above, approved the settlement made after giving full consideration to the matters involved.

It is in evidence that a majority of the Indians were capable and intelligent persons, and one-half or more of those signing the document well understood the English language and were able to sign their own names to this paper. Among the signatures are those of Richard W. Shunatona, who had been selected by the Indians as their special interpreter, and Mitchell Dervin, the official interpreter, both being members of the tribe at the time. These interpreters also signed a certificate to the instrument, certifying that they had fully and carefully interpreted all that had passed between the Indian Inspector (McLaughlin) and said Indians, and that the Indians thoroughly understood the nature of the subject matter in controversy, and that they had signed the same of their own free will and volition.

While it is a fact that years later some of the Indians who executed this settlement document testified to questionable conduct on the part of McLaughlin and to traitorous conduct on their own part, this testimony was that of self-serving witnesses, which, we do not think should overcome the statements of McLaughlin himself, statement of the interpreters, and the subsequent ratification, after full consideration, by the Congress of the United States.

Although the defendant government was at the time a trustee for the Indians in the matter of sale of and collection for these lands, yet, as to this particular transaction, the Indians had been recognized as of sufficient intelligence and mental capacity to determine for themselves as to whether or not they would accept the terms of settlement proposed, the Congressional Act of 1893 authoriz-

ing a compromise of these matters, provided that no settlement should be made except with the consent of the Indians. Therefore, it would seem that as to this transaction they were recognized as and were "sui juris."

In this connection, attention is called to the fact that the defendant in no way benefited by this settlement, but the same was in settlement of a controversy entirely between the Indians and the defaulting purchasers of their lands.

As for the contention that the instrument was executed by individual members of the tribe and not the action of the Indians as a council, this seems immaterial to us. The act of Congress of 1893 merely provided that the consent of the Indians should be obtained, and it is in evidence that three-fourths of the adult members of the tribe signed the instrument. A similar document in the form of a release was held valid by the Supreme Court in the case of Klamath and Moadoc Tribes vs. United States, 296 U.S. 244. Such release, while submitted to the Indians in council, as was done in the instant case, was executed by the signing of the individual Indians. Attention is also called to the language of the Court in holding the release valid because it was not shown that "anything was done to overreach the plaintiffs. On the contrary, the circumstances disclosed by the findings tend quite strong to indicate that the negotiations were fairly conducted." As in the Klamath case, our findings fail to show that any person acting for the United States deceived or misled the plaintiff in connection with the transaction under scrutiny.

In determining the validity of this compromise

settlement and its binding effect on the Indians, consideration must also be given to the fact that the original purchase price of the lands involved was far in excess of the appraised value thereof —that said appraised value had been determined by appraisers, one of whom had been selected by the Indians themselves—that contentions had been made from time to time of misrepresentations made by government agents at the time the sales were made, and that promises of adjustment of excessive bidding were made at the time—and that the controversy over full payment of the unpaid portion of the original purchase price had raged unabated for a period of sixteen years following the sale.

While it is argued by the plaintiff that the reason for difficulty in "getting the money" was the political influence of the settlers who wanted the rebate, and not because the land involved was not worth the full balance due, the question as to whether or not to make this rebate and get the balance immediately was a practical one. The Indians, doubtless, came to the conclusion that they would prefer to get "the bird in hand" rather than to try for the "two in the bush."

Being of the opinion that the plaintiff Indians were intelligent and capable, that they exercised this right of determination without being coerced or having fraud practiced upon them, we are of the opinion that this Cause of Action should be dismissed.

AWARD

From the above opinion and findings of fact on which based, it follows that plaintiff is entitled to

an award in the amount of $1,179,058.40, less such offsets, if any, as may hereafter be allowed in accordance with Section 12 of the General Rules of Procedure of this Commission.

On the question of plaintiff's right to interest on the awards made, we are of the opinion that there was not a "taking" of plaintiffs' lands in a constitutional sense, and the Indian Claims Commission Act does not provide for the allowance of interest on awards made under clauses (3) or (5) of Section 2 of the Act. Interest on the award, therefore, is not allowed.

EDGAR E. WITT,
Chief Commissioner.

Concurring:

WM. M. HOLT,
Associate Commissioner.

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 11

OTOE AND MISSOURIA TRIBE OF INDIANS, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Dated: March 31, 1953.

OPINION

O'MARR, Commissioner, concurring in part and dissenting in part:

I join in the interlocutory order herein to the extent that it dismisses the first, second, fifth, sixth

and seventh causes of action and awards the plaintiff $554,589.85 on the third cause of action, however, I cannot assent to the award of $624,468.55 on the claim set forth in the fourth cause of action for the reasons I shall now state.

The fourth claim is for the difference between the value of the land of plaintiff situate in Nebraska, which they ceded by the treaty of March 15, 1854, 10 Stat. 1038, and the purchase price the Government paid therefor.

The historical background of the claim is set forth in the Findings of Fact by which it is shown that by the treaty of July 15, 1830, 7 Stat. 328, II Kapp. 305, the Otoes and Missourias joined with several other tribes in ceding and relinquishing to defendant a large area of land lying in Iowa, along and easterly of the Missouri River. Neither the treaty nor the evidence shows the area occupied by plaintiffs, or claimed by them, but Article I of the 1830 treaty, after ceding and relinquishing all the Iowa lands of the several tribes, including those of plaintiff, contains this provision: "But it is understood that the lands ceded and relinquished by this Treaty, are to be assigned and allotted under the direction of the President of the United States, to the Tribes now living thereon, or to such other Tribes as the President may locate thereon for hunting, and other purposes." Thus, it appears that the several tribes, including plaintiff, reserved the right to have lands "assigned and allotted" to them, and other tribes which may be located thereon, "for hunting, or other purposes." Whether any of the ceded lands were ever allotted to the plaintiff I do not know, but I do know that by the treaty of September 26, 1833, 7 Stat. 431,

other Indians were placed on the major part of the lands in Iowa, ceded by the 1830 treaty. While it appears that plaintiffs were located on the west side of the Missouri and on lands lying between the Big Nemaha and North Platte Rivers at the time of the 1830 treaty, I find nothing indicating a relinquishment of their rights in the Iowa lands reserved to them by Article I of the 1830 treaty until the relinquishment thereof in 1854.

By the treaty of March 15, 1854, 10 Stat. 1038, plaintiffs ceded to defendant "all their country west of the Missouri river" (Art. 1), and by Article 3, plaintiffs "relinquish to the United States, all claims, for money or other thing, under former treaties, and all claims which they may have heretofore, at any time, set up, to any land on the east side of the Missouri river." Obviously, the reference to land on the "east side of the Missouri river" was the Iowa land in which plaintiffs retained the right to have at least a part thereof assigned and allotted to them "for hunting, and other purposes." What the "claims for money or other thing, under former treaties" were does not appear. At any rate, defendant and the plaintiffs considered the land claim and claims under former treaties of importance, for by Article 4 the consideration therein set forth was expressly stated to be in "payment for the country herein ceded and the relinquishments herein made." No separation was made of the amounts to be paid as the consideration for the Nebraska lands ceded or of the amount to be paid for the relinquishments above mentioned, either in the treaty or shown by the evidence, so it is impossible to tell what part of the consideration was for the cession and what was for the relinquish-

ment, but we must assume that part of the consideration was for the relinquishment of rights in the Iowa land and rights under former treaties.

The Commission by its finding 12 (3) states that the total consideration paid for the cession of the Nebraska land and for the relinquishment of plaintiffs' rights in the Iowa lands was $463,423.74, and also, that there is no evidence to show what part, if any, was for the relinquishment of the plaintiffs' claim to the lands east of the Missouri River, but treats the entire amount expended for the Indians under the 1854 treaty as the consideration for the cession of the Nebraska lands (pp. 10, 11, 12 of Opinion) and on that basis makes the award on the Fourth Cause of Action in the amount of $624,468.55.

The plaintiffs concede that it is impossible to determine what portion of the consideration stated in the 1854 treaty was for the ceded lands west of the Missouri (in Nebraska), and what part was for the relinquishment of their rights in the lands lying east of the Missouri (in Iowa), but they assume that a substantial part of it went for the relinquishment, for they suggest that the Commission take an "arbitrary figure" of one-third of $463,423.74 as consideration for the relinquishment. (pp. 148-9, plaintiffs' brief, and proposed findings 18, 21, pp. 298-300 of brief.)

The Commission, as I have said, has considered the entire amount paid the Indians under the 1854 treaty, $463,423.74, as the consideration for the cession of the Nebraska lands. I think this is contrary to the evidence and inconsistent with findings and opinion. We are here dealing with the question as to whether the amount the Indians received

for their Nebraska land under the 1854 treaty was unconscionable. Certainly the amount they received for the land they ceded is necessary to determine that question. Merely for discussion, suppose we take plaintiffs' "arbitrary figure" of $308,949.16 (proposed finding 21 of plaintiffs' brief, p. 300) as the amount they received for the Nebraska cession valued by the Commission at $1.00 per acre, obviously, an entirely different problem would thus be presented than that determined by the Commission insofar as unconscionable consideration is concerned. Furthermore, the amount received for the Nebraska lands must be determined by the evidence and not based upon an "arbitrary figure," as plaintiffs suggest, or upon a finding not supported by evidence, as I believe is the situation here. And it would make no difference whether the ground of recovery is based upon unconscionable consideration—which the Commission doubts (Finding 17), or upon the ground, as the Commission states, that "the payment of so inadequate a consideration was unquestionably unfair and resulted in an injustice to the plaintiff tribe" (Finding 17), for in either case the resulting award would be erroneous because of the uncertainty or impropriety of the amount deducted from the value for the consideration paid in order to fix the amount the plaintiffs are entitled.

Again, but aside from the fact that there is no way under the evidence to determine what the plaintiffs were paid for the Nebraska land, I think the award is erroneous because the Commission did not deem the value of the Blue River tract, comprising 162,107.71 acres and lying outside the

Nebraska area ceded by plaintiffs in 1854, a part of the consideration for that cession.

In arriving at the amount of the award, $624,-468.55, the Commission found there were 1,250,000 acres of land ceded and it deducted from this acreage the 162,107.71 acres on the Blue River, leaving a net of 1,087,892.29 acres valued at $1.00 per acre, and it then deducted from the value of this net acreage $463,423.74 (being the total sum of the expenditures made by defendant pursuant to Articles 4, 5, 7 and 12 of the 1854 treaty) and thereby arrived at the amount of the award. In this way, the Commission, in effect, included the Blue River tract as part of the consideration, although finding 16 clearly indicates that this land was not deemed a part of the consideration.

I would concede that if the value of the Blue River tract was $1.00 per acre the Commission's figures are correct, however, the method used in reaching the result assumes an arbitrary value of $1.00 per acre for the Blue River land. This, in my opinion, is an artificial value, for there is no proof whatever as to the value of the Blue River tract as of the time plaintiffs acquired it. There is proof though (Findings 18-20), that in the late 1870's and early 1880's, this same land was sold for nearly one million dollars. These sales do not, of course, fix the value as of 1854, but indicate that the tract was of substantial value when acquired. But whether the value is more or less than $1.00 per acre is immaterial, for in my judgment value must be based on evidence and only in that way is there any legal basis for a finding based thereon.

What I have said concerning the Blue River tract would not, of course, solve my basic objection

to the award, even if the value of the tract were proved, because the value of that tract, if added to the amount the Commission found to be the consideration, would simply show the total consideration paid for the cession of the Nebraska land and the relinquishment of the reserved rights of plaintiffs in the Iowa land and under treaties prior to 1854.

(S.) Louis J. O'Marr,
Associate Commissioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 277

THE UNITED STATES OF AMERICA, PETITIONER

v.

OTOE AND MISSOURIA TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE OTOE AND MISSOURIA TRIBE IN OPPOSITION

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In the Supreme Court of the United States

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No. 277

THE UNITED STATES OF AMERICA, PETITIONER

v.

OTOE AND MISSOURIA TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE OTOE AND MISSOURIA TRIBE IN OPPOSITION

QUESTION PRESENTED

Whether Congress by clauses 3 and 5 of section 2 of the Indian Claims Commission Act conferred jurisdiction on the Commission to hear and determine claims of Indian Tribes based on ownership of land by "original Indian title"?

STATEMENT CONCERNING THE "QUESTIONS PRESENTED" AS FRAMED BY THE GOVERNMENT

As framed, petitioner's first question may convey the impression that section 2 "creates liability"

as a matter of law without any obligation on a claimant to establish the facts which would entitle it to a determination of liability. Such an impression would be completely erroneous. If liability were thus created by statute, the only issue before the Commission would be the amount of the award. However, the Act has been consistently construed by the Indians Claims Commission and the court below to mean that the Government is liable only "if facts sufficient to establish the cause provided for were presented by the Indian claimant." (Pet. App. 17b). See *Klamath and Modoc Tribes* v. *United States,* 2 Ind. Cl. Comm. 684. Thus, in this very case the Commission dismissed five of seven claims asserted by the Tribe, for claimant's failure to establish the *facts* entitling it to a determination of liability. (Pet. App., first claim, 92b; second claim, 95b; fifth claim, 102b, 103b; sixth claim, 103b; seventh claim, 109b.)

Petitioner's first question also calls for consideration of all five clauses of section 2 defining the Commission's jurisdiction. Clauses 1, 2 and 4 are not here involved. Clauses 1 and 2 correspond to the general jurisdiction of the Court of Claims (28 U.S.C. 1505) and we now understand they do not embrace "original Indian title" claims. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272. It is here undisputed that respondent's claims do not fall under clause 4, which does not cover claims based on ratified treaties of cession such as here

involved. Accordingly, we have confined the question to clauses 3 and 5.

There is liability under clauses 3 and 5 only if the claimant establishes the facts of ownership, plus the facts of fraud, duress, unconscionable consideration or unfair and dishonorable dealings as the case may require. Unless so interpolated and unless limited to clauses 3 and 5, the Government's "Question 1" is not accurate.

We also point out that petitioner's "Question 2" was not raised below. (*infra,* pp. 16-18)

STATEMENT

We are here concerned with an award granted without interest under the Indian Claims Commission Act, for two tracts of land ceded by the Otoe and Missouria Tribe to the United States by ratified treaties of 1833 and 1854. The Tribe was the owner of the land by "original Indian title" —that is, from time immemorial the Tribe possessed and occupied the defined ceded areas to the exclusion of all other Indians. (Pet. App. 48b, 56b.) *United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339, 345.

The petitioner contends that the court below erred in holding that original Indian title is compensable under the Indian Claims Commission Act. On the mistaken premise that the subject of valuation was "fee simple title" petitioner asserts also, that, even if there is liability, it was error for the court below "to employ the value of a fee

simple title * * *." (Pet. 23.) In addition, the petitioner utilizes statistics demonstrably unreliable and exaggerated, as an oblique suggestion that the amount involved and not the merits should influence this Court's action. In this brief we shall demonstrate (1) that this case does not present any questions which require review; (2) that the decision below does not create any problems of judicial administration calling for exercise of this Court's supervisory jurisdiction; (3) that the Court of Claims was clearly correct in holding that original Indian title is compensable; (4) that the "fee simple title" value point was not raised below; and (5) that the statistical data used by the Government is not objective, is not based on the best information available to the Government, is designed to exaggerate the acreage and amounts involved, and is therefore misleading.

1. *This case does not present any questions which require review.* There is no conflict of decisions. The holding that original Indian title is compensable under the Indian Claims Commission Act is consistent with the pronouncement of this Court. In *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, this Court affirmed the decision of the court below that "original" Indian title is not protected by the Fifth Amendment, and is not otherwise compensable without "specific legislation." At the same time, the Court marked the Indian Claims Commission Act as an example of the "specific legislation" lacking in the *Tee-Hit-*

Ton case. In its footnote 2 [1] the Court cited the Act as an illustration of legislation in support of "the policy of the Congress continued throughout our history, to extinguish Indian title through negotiation rather than by force, and to grant payments from the public purse to needy descendants of exploited Indians." That policy, the Court stated, "has received consistent interpretation from this Court in sympathy with its compassionate purpose." *Tee-Hit-Ton Indians* v. *United States, supra,* p. 274. The inside pages noted by the Court in the three cases it cited in its footnote 2 in support of the statement just quoted, emphasize that legislation such as the Indian Claims Commission Act should be liberally construed to accomplish its "compassionate purpose." (*idem, p.* 274.) In the same tenor, the Court cited the Act a second time, as proof that "Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. 60 Stat. 1050." (*idem,* pp. 281-282.)

Even before the *Tee-Hit-Ton* case, it was recognized that claims based on original Indian title could be pursued under the Indian Claims Commission Act. In the first *Alcea* case (*United States* v.

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[1] Footnote 2 of the *Tee-Hit-Ton* opinion reads as follows (348 U.S. at p. 274): "See Indian Claims Commission Act, 60 Stat. 1049; *Worcester* v. *Georgia,* 6 Pet. 515, 582; *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 87, 89; *United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339, 354."

Alcea Band, 329 U.S. 40, 49), Chief Justice Vinson referred to the Act as the "latest indicia of Congressional regard for Indian claims" and observed that under the Act "not only are claims similar to those of the case at bar [claims based on original Indian title] to be heard, but 'claims based upon fair and honorable dealings * * *' may be submitted * * *." Mr. Justice Black regarded the Act as the "capstone" of the pattern of Congressional legislation "which has become progressively more generous in its treatment of Indians." He considered that an action to recover for lands held by original Indian title could be pursued under "this broad recent legislation." (329 U.S. at pp. 54-55.)

In *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 103, n. 22, there was occasion to express the view that the United States may terminate the tribal use and occupancy of an Executive Order reservation without legal liability. Immediately, Mr. Justice Reed, speaking for the Court, made the special note that "Possible claims under the Indian Claims Commission Act of Aug. 13, 1946, are not covered by this statement. [Citing and quoting section 2(5), the "fair and honorable dealings" clause.]" It seems significant that in the *Hynes* case the Court considered a claim based on the use of public land reserved by Executive Order to be covered by the "fair and honorable dealings" clause. *A fortiori,* a claim founded on ownership of aboriginal holdings, ceded by a ratified treaty, falls within the scope of that clause.

The construction given to the Indian Claims Commission Act by the court below is in accord

with the observations of this Court including its most recent pronouncements in the *Tee-Hit-Ton* case. (Pet. App. 37b-40b.) No questions are presented which require review.

2. *The decision below does not create any problems of judicial administration calling for exercise of this Court's supervisory jurisdiction.* Congress vested trial jurisdiction in the Indian Claims Commission and appellate jurisdiction in the Court of Claims. The Commission's findings of fact are "conclusive" if "supported by substantial evidence" and, on appeal, the Court of Claims has the "exclusive jurisdiction" to test the substantiality of the evidence supporting the Commission's findings of fact and the power to determine the validity of questions of law decided by the Commission. (Section 20 of the Indian Claims Commission Act, 25 U.S.C. 70s.)

The decision below is in accord with the lower court's own prior decisions recognizing by implication that a claim based on original Indian title falls within clauses 3, 4 or 5.[2] It reaffirms the consistent policy of the Commission, expressed in scores of cases, to reject the contention that original Indian

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[2] *Snake or Piute Indians* v. *United States*, 125 C. Cls. 241, 244, n. 1; *Pawnee Tribe of Oklahoma* v. *United States*, 124 C. Cls. 324, 327-328; *Quapaw Tribe of Indians* v. *United States*, 128 C. Cls. 45, 47-48, 50; *Delaware Tribe of Indians* v. *United States*, C. Cls. , Appeal No. 2-54, decided February 8, 1955, slip opinion, p. 2. Compare, *Assiniboine Indian Tribe* v. *United States*, 128 C. Cls. 617, 629-630, certiorari denied, 348 U.S. 863. Each of these cases involved a claim based on original Indian title arising under clauses 3 or 4, and in each, the Court of Claims affirmed or reversed on the merits.

title is not compensable and to deal with the cases on the merits. The principles thus established have guided claimants in the preparation and presentation of numerous cases before the Commission since it took life over eight years ago.

Considering that the primary appellate responsibility for questions arising under the Indian Claims Commission Act was vested in the Court of Claims, and considering the special competence and experience of the Court of Claims in Indian claims matters, its decisions should be reviewed by this Court only where they might frustrate the basic purpose of the Act, or make its administration by the Commission unmanageable, or where manifest injustice has been done. No such condition is presented here. Moreover, in this case the Court of Claims acted in its appellate capacity. This is not the same situation as with prior Indian claims under special jurisdictional acts, or claims such as *Tee-Hit-Ton* under the general jurisdiction of the Court of Claims (28 U.S.C. 1505), where there was no intervening appellate tribunal and this Court afforded the only review.

3. *The decision below is correct.* Section 2 of the Indian Claims Commission Act contains five numbered clauses defining the jurisdiction of the Commission.[3] Clauses 1 and 2 cover claims in law or

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[3] Under section 12 of the Act, the Commission's jurisdiction is limited to claims arising prior to August 13, 1946. Under section 24, (codified as 28 U.S.C. 1505) tribes with claims arising subsequent to August 13, 1946 are given the same, but no greater, rights as nontribal litigants to maintain suit against the United States in the Court of Claims.

equity including those sounding in tort. In general, these put tribal claimants on par with other claimants against the United States. (H. Rept. No. 1466, 79th Cong., 1st sess. (1945) p. 11.) All other possible claims fall under the broad and comprehensive language of clauses 3, 4 and 5, including those not ordinarily cognizable in the Court of Claims or in a court of general jurisdiction between private litigants and, in addition, moral or ethical claims otherwise nonjusticiable. (Pet. App. 4b-5b.)

Under clause 3, the Indian Claims Commission may deal with a treaty or contract as if "revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity." Under clause 4, tribes may seek "just compensation for lands taken from them under the guise of an unratified treaty or otherwise without compensation." H. Rept. No. 1466, *supra,* p. 11. It covers "Indian lands, i.e., lands to which tribal claimants had 'Indian title' or the 'right of occupancy.' Sometimes these lands were taken under the guise of unratified treaties, sometimes without any semblance of a treaty." H. Rept. No. 2693, 79th Cong., 2d sess. (1946) pp. 5-6. And under clause 5 falls "any claim which would arise on a basis of fair and honorable dealings even though not recognized by any existing rule of law or equity." H. Rept. No. 1466, *supra,* p. 12.

The court below noted that under the petitioner's view the word "treaties" in clause 3 does not mean *all* treaties but only those ceding land held by

"recognized" Indian title, and the word "dealings" in clause 5 does not mean that *all* dealings should be tested by the standard of "fair and honorable," but only those involving land held by "recognized" Indian title. (Pet. App. 18b.)

Petitioner's refined construction would lead to this absurd consequence: If the United States procured a cession of original Indian title land by fraud through a ratified treaty, the Commission would be powerless to grant relief for the fraud under clause 3 and would be powerless to apply the standard of "fair and honorable dealings" to the transaction. But, if the treaty were unratified or, if there were no treaty, the Commission could give relief on account of the fraud under clause 4. The Court of Claims refused to follow petitioner. It concluded that "the literal meaning of clauses (3) and (5) does not require the exception urged" by the Government. (Pet. App. 19b.) It pointed out that the key words "treaties" and "dealings" are not limited to land, but embrace all tribal-Government transactions. In their ordinary context the words include all treaties and dealings, and are not confined to those concerned with "recognized" title. (Pet. App. 19b-20b.)

The court considered this interpretation to be consistent with other provisions of the statute. Thus, clause 4 allows compensation for "lands" taken by treaty "or otherwise"[4] and this means

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[4] Petitioner's cautiously couched concession concerning clause 4 would limit its application to the instances where "government agents had agreed with the Indians on the amount

"lands to which tribal claimants had 'Indian title' or the 'right of occupancy.'" H. Rept. No. 2693, 79th Cong., 2d Sess. (1946) p. 5. See *Snake or Piute Indians* v. *United States,* 125 C. Cls. 241, 244, n. 1. Since Congress included original Indian title claims under clause 4 the court below found no justification for reading an intent to exclude original title claims from the general phraseology of clauses 3 and 5 unless required by the legislative history. (Pet. App. 20b-21b.)

The opinion below contains an exhaustive and detailed exposition of the legislative history of the Indian Claims Commission Act extending in various forms over a period of sixteen years and eight Congresses (71st, 73d-79th, inclusive.) (Pet. App. 21b-37b.)[5] A summary of the conclusions drawn by the court below from its study of the legislative history is set out in its opinion (Pet. App. 37b.) That history revealed nothing which would support importing the limiting phrase "recognized Indian

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to be paid for Indian title but for some reason the treaty was not ratified." (Pet. 20.) Of course, this artificial construction ignores the phrase "or otherwise" in clause 4 and is totally oblivious to the explanation in the conference report which precludes any such restricted interpretation. H. Rept. No. 2693, *supra*, p. 5.

[5] Commencing January, 1930 with the introduction of H.R. 7693, 71st Cong. See also S. 3444, 73rd Cong.; H.R. 8554, S. 1465, H.R. 6655, S. 2731, H.R. 7837, all 74th Cong.; S. 1902, H.R. 5817, S. 2164, S. 4206, S. 4234, S. 4349 (cf. S. 3083) all 75th Cong.; S. 1111, H.R. 4339, 77th Cong.; H.R. 4693, H.R. 5569, both 78th Cong.; H.R. 1198, H.R. 1341, and finally H.R. 4497 (which ultimately became the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049), all 79th Cong.

title" into clauses 3 and 5 so as to exclude from coverage all "treaties" or "dealings" arising from "original Indian title." On the contrary, it affirmatively establishes that broad and comprehensive language was deliberately chosen to carry out the objectives of the Act—namely to free Congress from the insistent demands of the tribes for special jurisdictional acts and to bring all tribal claims to a final determination, e.g. H. Rept. No. 1466, 79th Cong., 1st sess. (1945), p. 2: " * * * giving them a full and untrammeled right to have their grievances heard * * * "; *Idem.* p. 3: "Purpose of the Bill * * * It would require *all pending Indian claims of whatever nature, contractual and noncontractual, legal and nonlegal, to be submitted* * * *;"[6] *Idem.*, p. 10: *"Jurisdiction.* In order that the decisions reached under the proposed legislation shall have finality it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include *all possible claims.* If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts. *And if the class of cases omitted is one which the Congress has in the past declared to be worthy of a hearing, in one or more jurisdictional acts,* it is probable that future Congresses will likewise grant a hearing to such claims, and the *chief purpose of the present bill, to dispose of the Indian claims problem with finality, will have been defeated*

[6] Emphasis supplied throughout this brief unless otherwise indicated.

* * *."; [7] and *Idem.* pp. 14-18 where the Attorney General and the Secretary of the Interior favored the disposition of "all" claims. Indeed, in this same House Report No. 1466, p. 15 and throughout the legislative history, the case of *Otoe and Missouria Indians* v. *United States,* 52 C. Cls. 424 (1917) involving the very treaties on which the awards below were granted, was repeatedly brought to the attention of Congress as a typical example of the need for comprehensive coverage. [8]

During the debates in the House (92 Cong. Rec. 5307-5323, May 20, 1946), the sponsors and those in charge of the bill, including the chairman and members of the House Committee on Indian Affairs, explained its objectives and provisions. They made clear that the bill was to "put an end to them [tribal claims]" 92 Cong. Rec. pp. 5307-8; to settle them "once and for all", p. 5308; "bring

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[7] The quoted language makes clear that the Committee was aware of past jurisdictional acts. And these included at least four instances where tribes were granted the right to sue on original Indian title. *Coos Bay Indian Tribe* v. *United States,* 87 C. Cls. 143, certiorari denied, 306 U.S. 653; *Wichita Indians* v. *United States,* 89 C. Cls. 378, 416; *Indians of California* v. *United States,* 98 C. Cls. 583; *United States* v. *Alcea Band,* 329 U.S. 40, affirming 103 C. Cls. 494.

[8] Hearings, Senate Commitee on Indian Affairs, S. 2731, 74th Cong., 1st sess. (1935), p. 11; Hearings, House Committee on Indian Affairs, H.R. 7837, 74th Cong., 1st sess. (1935), p. 20; Hearings, House Committee on Indian Affairs, H.R. 1198 and H.R. 1341, 79th Cong., 1st sess. (March 1945), p. 114; H. Rept. No. 1466, 79th Cong., 1st sess. (1945), p. 15. While not shown in the opinion (52 C. Cls. 424), the record in the early *Otoe and Missouria* case shows that the identical treaties here in suit were the gravamen of the petition. (Court of Claims, Printed Records, Volume 341, Docket No. 31003.)

them to a conclusion once and for all" to give tribes "an opportunity to present all their claims of *every kind, shape and variety,*" to include *"all possible claims,"* p. 5312; to "give the Commission the broadest possible jurisdiction to consider *every Indian grievance,* real or fancied," p. 5316.

The Senate Committee on Indian Affairs condensed section 2 by eliminating three of the six classes of claims set out in the House version, leaving what are now clauses 1, 2, and 5. However, the committee report made it crystal clear that the language was stricken "for purposes of clarification and there is no intention on the part of the committee to deprive claimants of the right to invoke the jurisdiction of the Commission in any case which would have been cognizable under the language of the bill as it passed the House." S. Rept. No. 1715, 79th Cong., 2d sess. (1946) p. 5. After passage by the Senate, the bill went to conference where these clauses were restored "out of an abundance of caution" to insure unlimited coverage. H. Rept. No. 2693, 79th Cong., 2d sess. (1946). (Pet. App. 34b-35b.)

The legislative history discloses that even if clauses 3 and 4 were not in the Act, the awards below could be sustained under clause 5. The phrase "fair and honorable dealings" or its equivalent was present in proposed Indian claims legislation ever since 1935.[9] It is difficult to conceive

[9] 74th Cong., 1st sess., (1935): S. 2731, H.R. 6655, H.R. 7837; Senate Hearings, S. 2731 (June 10, 1935), pp. 24, 25, 26. 75th Cong., 1st sess, (1937): S. 4206, S. 4234, S. 4349. 77th

of more inclusive language. The choice was deliberate. Clause 5 was the "catch-all," it was the insurance steadfastly insisted upon by the Congress from the beginning, that no claim, legal, equitable, moral, or ethical, be omitted from the scope of the Act. It was to allow claims "even though not recognized by an existing rule of law or equity." H. Rept. No. 1466, 79th Cong., 1st sess. (1945) p. 12. The Attorney General advised Congress that it would embrace "those claims which are solely on moral or ethical grounds and which are not ordinarily justiciable in a court * * *." *Idem*, pp. 16-17.

The conference report disclosed the understanding that clause 5 was inclusive of clauses 3 and 4. Thus, when those two clauses were restored after deletion by the Senate, the conference report explained that "Both of the classes of claims reinserted by the amendment may fall within the category of 'fair and honorable dealings.'" House Rept. No. 2693, 79th Cong., 2d sess. (1946) p. 6 (Pet. App. 35b). Here, as in the court below, petitioner sidesteps discussion of the broad language of clause 5. It can suggest no rational basis for reading the "fair and honorable dealings" clause out of the Act and it can find no support for its position in the legislative history.

Cong., 1st sess. (1941): S. 1111, H.R. 4339, S. Rept. No. 909, p. 5. 78th Cong., 2d sess. (1944): H.R. 4693, H.R. 5569. 79th Cong., 1st sess. (1945): H.R. 1198, H.R. 1341, H.R. 4497, H. Rept. No. 1466, pp. 16-17; House debate, 92 Cong. Rec. 5313; 79th Cong., 2d Sess. (1946): S. Rept. No. 1715, p. 8, H. Rept. No. 2693, p. 6.

4. *The "fee simple value" question was not raised below.* Petitioner asserts that it was "clearly erroneous [for the court below] to employ the value of a fee simple title * * *." (Pet. 23.) It assumes the premise that fee simple title was the subject of the valuation. The point is foreign to this case. It was not raised below. Petitioner makes no supporting record references and the fact is there is nothing in this record to show that fee simple title was valued. The words "fee simple" appear nowhere in the findings or opinions below. The value witnesses for both sides expressed opinions in terms of the market value of the land ceded by the Tribe, not in terms of "fee simple." The only points of difference between the parties were the *methods* of valuation and the *amount* awarded by the Commission. There was no dispute as to the *subject* of the valuation. Both parties were valuing the same thing, but were using different techniques of valuation. That is how the question was presented and considered below. (Pet. App. 52b-53b.) And the Court of Claims correctly reaffirmed the long established and orthodox method of valuation approved in *Alcea Band* v. *United States,* 115 C. Cls. 463 (reversed as to interest 341 U.S. 48, but certiorari denied as to the valuation point 340 U.S. 873).

This "even if" argument is a complete afterthought by the Government. The Indian Claims Commission did not hold that the Tribe owned the fee simple and it did not place a value on the fee

simple. (Pet. App. 83b, Fdgs. 14, 16.)[10] The point was not mentioned in the Government's notice of appeal from the Commission's determination or in the statement of points on which the Government relied.[11] The question was not briefed or argued before the Court of Claims and it was not considered or decided. In short, it was not "properly raised, litigated, or passed upon below." *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328. As a matter of fact, since in the court below,

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[10] Before the Indian Claims Commission the Government challenged the value evidence of the claimant on the ground that the witness was not qualified and because he was not using the Government's concept of market value. (Transcript of testimony, May 15, 1951, p. 999.) At no time did the Government charge that the Tribe's value evidence was based on fee simple title or object on that ground and contend that some lesser estate should be valued.

[11] The Government's notice of appeal makes clear that it asked the court below to review the *amount* allowed by the Commission. Nothing was said about the *subject* of the valuation. As to value, the notice of appeal was limited "to that portion of the final determination * * * which * * *

> 4. Finds and determines that the market value of the lands ceded by the treaty of 1833 was 75 cents an acre, and that the market value of the lands ceded by the treaty of 1854 was $1.00 an acre."

Again, in the statement of points on which it relied before the Court of Claims, the only point concerning value was as follows:

> 3. That the evidence is not sufficient to sustain the findings of the Commission that the lands ceded by the treaty of 1833 were worth 75 cents an acre, and that the lands ceded by the treaty of 1854 were worth $1.00 an acre.

(Appeal 1-54, Record on Appeal filed January 28, 1954, pp. 292-294.

the Government limited its attack to the weight of the value evidence and the method of valuation it impliedly conceded the correctness of the *subject* of the valuation, whatever it was.

In any event, the point not having been presented or decided, it affords no basis of importance to the administration of the Act warranting granting the writ. This is particularly true since the question comes to this Court without the benefit of development through argument and determination in the court below.

5. *Petitioner has exaggerated the effect of the decision below.* Petitioner utilizes a table of cases to bolster its statement to the Court that 249 cases "now pending before the Commission involve claims based upon original Indian title." (Pet. 11-12; Pet. App. A.) The purpose of the table is not clear, since we are confident that the Court's action on the merits will not be influenced by the amount involved. If pertinent at all, the only statistic which has bearing here, is the probable recovery, not the exaggerated acreage traditionally claimed in petitions. There are figures available from the Commission itself which give the best idea of the ratio between claims and recoveries. As of July 28, 1955 out of 71 decided cases, awards totalling $11,345,738.11 were granted in 17 cases. In the 71 cases, claimants had sought $775,069,195 in their petitions. (In 19 cases no amount was stated.) In other words, the ratio based on experience is $11.35 awarded for each

$775 asked.[12] Petitioner preferred to base its prognostications for all claims cases, on the statistical experience of this one case in which the award represents about 25 cents for each acre claimed. (Pet. 12.) This is a wholly unfair and misleading use of figures.

We deplore the failure of the United States to give the Court the most reliable data available. The petitioner has the defense of all these cases concentrated in a single unit of the Department of Justice. It has filed motions to consolidate for trial or similar motions in virtually every case where there are conflicting claims for the same land. It necessarily has made an extensive study of the problem of overlaps. It knows which claims duplicate each other, which claims arise under clause 4 and are not affected by the decision below, which claims are based on recognized title and would not be affected by this case, and which claims have been adjudicated. It seems to us that if petitioner is going to engage in statistical byplay, it has a duty to furnish facts known to it, even if those facts do not reflect the results it desires. Therefore, we dispute the broad representations concerning the number of cases and the acreage involved as grossly inaccurate. We show as follows:

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[12] See Appendix I, *infra*, p. 23, containing a summary of the status of cases before the Indian Claims Commission as of July 28, 1955. These statistics are compiled by the Indian Claims Commission in connection with its report to Congress.

Duplicated acreage. This Tribe does not have the resources to furnish a precise statement of duplicated acreage without examining each case on file. Those facts are easily available to petitioner in connection with its defense of these claims and the numerous motions to consolidate it has prepared. There are overlaps in almost every land claim filed. Certain instances are known to us. For example, there are 37 cases completely duplicated in 12 others.[13] But petitioner lists all 49 cases and repeats the acreage for each, thus swelling its figure by about 67 million duplicate acres. Again, there are four cases covering the identical claim under the same treaty or agreement. (Dockets 113, 191, 221, and 246.) Petitioner lists the four cases separately, thus increasing its total by about 27 million duplicate acres. In 17 cases consolidated for trial on the claim of the California Indians the same land is claimed two and three times. Dockets 124, 130, 131 duplicate the land in Dockets 67, 252, 253 and 254. Petitioner lists 33,066,689 duplicate acres. There are huge overlaps in the Sioux claims (Dockets 74, 142, 322.) There are many, many others. These are things the Government *knows* about and could easily furnish to the Court. If statistics are to carry weight, let them reflect the known facts.

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[13] Docket Nos. 29A-29G, 29I, -J, -K; 13A, -E, -F, -G, -J, -K, -L, -M; 15C-15M, incl.; 40C, -D, -E, -F, -H, -I, -J, -K; all duplicate each other and are embraced in Docket Nos. 71, 71A, 128, 146, 216, 217, 306-111, incl.

Clause 4 cases. Where there is no treaty or an unratified treaty, original Indian title is compensable under clause 4. (See Pet. 20.) Nevertheless, we have found 67 cases listed by petitioner which fall under clause 4. We are confident there are more. The cases are listed in Appendix II, *infra,* pp. 24-25. These cases have no place here, since it is undisputed that respondent's claims do not fall under clause 4.

Recognized title. Petitioner concedes recognized Indian title is compensable. Yet it lists at least 42 cases we have found where the claim is based on recognized Indian title. Petitioner even includes one case where the Commission has adjudicated that the title is recognized. (Miami-Docket No. 67, 2 Ind. Cl. Comm. 635, 640.) These cases are set out in Appendix III, *infra,* pp— —. We are sure the list is incomplete. These cases should not appear in an objective listing of original Indian title claims.

Other inaccuracies. Even without a detailed study, and on the basis of what is shown above, the petitioner's estimates of claims affected by the decision below is unreliable. But there are other improper items noticeable on the face of the table. Thus, petitioner includes the acreage listed in the complaint in the very case at bar, although the correct acreage has been adjudicated. Petitioner lists Docket 323 as claiming 13 million acres although it claims only about 90,000 acres and those 90,000 acres were a treaty reservation—recognized

title. Petitioner lists Docket 172 Yuchi (11,200,000 acres) although it has been dismissed with prejudice. There are other items disclosing either gross carelessness or a complete loss of objectivity inspired by statistical fervor to magnify the claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1955.

APPENDIX I

Summary of Status of Cases, Indian Claims Commission As of July 28, 1955

The awards, amounts claimed, and the status as to appeal, of the 71 claims decided, are shown below:

		No. of Cases Where Award Granted	Awards	Principal Claimed
56	final	8	$ 8,280,136.64	$547,826,808
5	on appeal	1	417,656.00	191,219,702
10	appealable	8	2,647,945.47	36,022,685
71		17	$11,345,738.11	$775,069,195 [1]

Appeals to the Court of Claims have been taken from 29 of the Commission's decisions covering 49 claims. The status of these claims, the amounts awarded and those claimed, are shown below:

		Awards Appealed	Final Award	Principal Claimed
24	affirmed	$ 927,965.49	$ 927,965.49	$478,262,455
2	reversed and awarded	.....	1,464,107.55	4,170,627
18	remanded and pending	1,156,034.35	.....	43,543,154
5	pending on appeal	417,656.00	.....	191,219,702
49		$2,501,655.84	$2,392,073.04 [2]	$717,195,938 [3]

[1] Includes only 52 cases since no dollar estimate in 19 petitions.
[2] This figure applies to 24 cases affirmed and 2 reversed.
[3] Includes only 42 cases since no dollar estimate in 7 petitions.

APPENDIX II

Table of 67 Cases Listed by Petitioner Which Arise Under Clause 4 and Are Not Affected by the Decision Below

Docket Number	Claimant	Amount of Acreage Claimed in Complaint
22	Apache	Not estimated
30	The Fort Sill Apaches	448,000
31 37	California	100,000,000
44	Uintah Ute Indians	2,240,000
46	Nooksack	498,080
48	Warm Spring Apache	Not estimated
80	Mission	Not estimated
87	Northern Paiute	Not estimated
88	Southern Paiute	Not estimated
90	Hualpai	Not estimated
91	Havasupai	Not estimated
94	Lower Pend D'Oreille	Not estimated
98	Muckleshoot	487,029
137	Pueblo de Zia	382,849
148	Missions, Cabazon	680
149	Missions, Twenty-Nine Palm	80
174	Pueblo de Pecos	764
176	Yokiah	Not estimated
171	Tee-Hit-Ton, Paul, Wm. L. Sr.	352,800
181	Conf. Tribe of Colville	Not estimated
182	Apache of Okla. (Ft. Sill)	Not estimated
170	Pascagoula, Biloxi	12,000,000
187	Chitina Indians of Alaska	Not estimated
196	Hopi	Not estimated
214	San Juan	120,000
215	Yana	Not estimated
211	Pueblo de Isleta	14,781
210	Hopi Village	Not estimated
218	Cowlitz	Not estimated
222	Palouse	Not estimated
227	Pueblo of Luguna	Not estimated

APPENDIX II—CONTINUED

Docket Number	Claimant	Amount of Acreage Claimed in Complaint
234	Chinook	Not estimated
266	Pueblo de Acoma	Not estimated
221	Chippewa Cree	Not estimated
264	Umatilla	12,160,000
228	Gila River Pima-Maricopa	Not estimated
295	Mohave	Not estimated
237	Upper Chehalis	Not estimated
240	Tillamook	Not estimated
261	Samish	Not estimated
262	Tulalip	Not estimated
263	Kikiallus	Not estimated
278	Tlingit & Haida	Not estimated
283	Colorado River	Not estimated
285	Unalakleet	64,000
287	Nisgah	Not estimated
326	Shoshone	41,624,270
330	Southern Paiute	Not estimated
332	Yankton Sioux	46,000,000
354	Pueblo of San Ildefonso	Not estimated
355	Pueblo of Santo Domingo	Not estimated
356	Pueblo of Santa Clara	50,000
357	Pueblo of Taos	Not estimated
358	Pueblo of Nambe	Not estimated
293	Swinomish	Not estimated
294	Skagit	Not estimated
350	Ft. Berthold	Not estimated
351	Chemehuevi	Not estimated
345	Papago	Not estimated
370	Palmer (Alaska)	Not estimated
347	Pitt River	6,400,000
333	Shasta (California)	10,000,000
344	Six Nations	7,657,654
369	Aleut (Alaska)	Not estimated
352	Aleut Community	Not estimated
286	Shungnak (Alaska)	Not estimated
	Acres	240,013,987

APPENDIX III

Table of 42 Cases Listed by Petitioner in Which the Claims Are Founded on "Recognized" Title and Therefore Are Not Affected by the Decision Below

Docket Number	Claimant	Amount of Acreage Claimed in Complaint
29B	Hannahville	7,876,620
29F	Hannahville	1,116,000
13J	Chippewa	1,666,666
13K	Chippewa	2,119,666
15D	Pottawatomie	7,521,960
15H	Pottawatomie	1,086,866
15J	Pottawatomie	5,852,960
18K	Chippewa	1,242,855
40H	Ottawa	1,666,666
45	Uintah Ute Indians	1,215,914
66	Peoria	6,496,167
67	Miami	6,700,000
71A	Potawatomi	5,850,000
99	Peoria	2,616,921
124	Miami	9,066,600
128	Potawatomi	475,000
138	Iowa	11,000,000
143	Sac & Fox	1,950,000
146	Potawatomi	4,933,350
153	Iowa	11,000,000
158	Sac & Fox	5,750,000
193	Kickapoo Tribe of Kansas	2,000,000
217	Pottawatomi	4,160,000
212	Wyandotte	119,140
231	Sac & Fox	1,250,000
253	Miami	4,500,000
254	Miami	2,000,000
306	Potawatomi	2,000,000
307	Potawatomi	Not estimated
308	Potawatomi	700,000
309	Potawatomi	2,626,560
310	Potawatomi	900,000
311	Potawatomi	1,109,760
314	Peoria	4,431,360
323	Ponca	7,000,000

APPENDIX III—CONTINUED

Docket Number	Claimant	Amount of Acreage Claimed in Complaint
327	Ute	3,776,876
329	Cheyenne Arapaho	43,000,000
348	Cheyenne Arapaho	Identical with No. 329
337	Delaware	3,000,000
368	Tonawanda (Seneca)	Not estimated
342	Seneca	6,841,687
343	Cayuga	64,000
	Acres	186,682,634

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 277

THE UNITED STATES OF AMERICA, PETITIONER

v.

OTOE AND MISSOURIA TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

In its Brief in Opposition, pp. 4, 18-22, respondent attacks the objectivity and reliability of the statistical data offered by the Government in support of its statement as to the importance of the questions presented by the petition for a writ of certiorari (Pet., pp. 11-13; Appendix A). Although it does not expressly say so, respondent implies that the decision in this case will not have an important bearing on the other cases instituted under the Indian Claims Commission Act. Even

if respondent's various criticisms of the petitioner's listing of cases were taken at face value, the result would be only a relatively small reduction in the total acreage involved, and this would be balanced by the 79 cases in which the areas involved have not been estimated. Respondent's objections are thus inconsequential, and the details thereof are irrelevant to the fundamental issue here. However, because of the serious nature of the attack upon the good faith of the Government, and because the attack, despite its vigorous language, is demonstrably unsubstantial, this response seems appropriate.

Estimate of potential liability. — Respondent (Br. in Opp., pp. 18-19) does not dispute that the decision below, if permitted to stand, would result in the subjection of the Government to a very substantial financial liability, but merely contends that the potential liability in "original Indian title" claims should be estimated by reference to the ratio of recovery in cases already decided (none of which involved "original Indian title") rather than by the ratio of recovery in the present case. We adhere to the view that our suggested estimate is more significant, since it derives from the precise situation presented here and in a host of other cases. We note, too, that while it attacks our calculation, respondent does not even attempt to suggest what lesser amount the total potential liability may reach; and, indeed, an estimate based upon respondent's method of referring merely to the amount *claimed* could never be made, since

most claimants do not state the amount sought.[1] Finally, we recognize, of course, that the amount of possible recoveries cannot now be stated with precision—which is all the respondent is really urging. But our inability to estimate and guarantee an accurate total does not destroy the importance of the questions raised in our petition. The crucial point remains that, under the decision below, the recoveries will unquestionably be huge —whatever their precise amount—as respondent does not and cannot deny. This consideration for certiorari, like the large number of pending cases affected, remains unimpaired by respondent's brief opposing the writ.

Duplicated acreages.—Respondent's attack (Br. in Opp., pp. 19-22) on the Government's compilation of cases (App. A, pp. 1a-5a) is no more convincing. We have frankly indicated that there was overlap in claims (Pet., p. 12; App. A, p. 5a), so that the estimated total acreage does not represent the total with the exactness we would desire. We acknowledge that in some cases we are aware of the more or less precise amount of overlap, but deny that there is as complete a duplication as indicated in the brief in opposition (p. 20). We also

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[1] In May, 1955, at hearings on various bills to terminate the Indian Claims Commission, the Clerk of the Commission testified that the amount of recovery sought was specified in less than one-third of the claims filed. Hearings on H. R. 220, H. R. 238, H. R. 1563, H. R. 3238, H. R. 5313, and H. R. 5566, before House Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs, 84th Cong., 1st sess., Vol. 1, p. 18.

dispute the assertion (p. 20) that precise information as to the overlap in all cases could easily be furnished by the Government. The task of compiling fully accurate figures as to the overlap would be a monumental one and, indeed, practically impossible in view of the 79 cases in which the acreage claimed could not be estimated or even definitely located because of indefiniteness in the claims. Thus, it is plain that the elimination of the known overlaps would not present any fairer picture than the compilation already at hand, which, we submit, is as accurate as circumstances permit. It is certain that the claimants in the cases cited would not agree with respondent that there is such complete duplication, and this is not the occasion to attempt to resolve such questions. And even the largest conceivable deduction for overlap would leave an enormous area still indisputably affected by the ruling of the Court of Claims.

Clause 4 cases.—We have previously pointed out that our compilation included some clause 4 cases and stated why we considered them pertinent here, even though respondent's claims do not fall under that clause (Pet., pp. 11-12, 20). Since we do not, as respondent implies (Br. in Opp., p. 21), concede that original Indian title is compensable under clause 4 in all cases where there is no treaty (see Pet., p. 20), the present case will have a direct bearing on clause 4 cases. And we must dispute the accuracy of respondent's compilation

of such cases (Br. in Opp., pp. 21, 24-25). Respondent apparently ignores the fact that the Indian claimants often plead alternatively under clauses 3 and 4 (*e.g.*, Docket No. 332, the Yankton Sioux Tribe) and that they often invoke clause 4 when the claim actually falls under clause 3 (*e.g.*, Docket No. 323, Ponca Tribe).[2] Thus, the great majority of the clause 4 cases listed by respondent are also properly listed as clause 3 cases.

Recognized title.—There is likewise no merit to respondent's contention (Br. in Opp., pp 21, 26-27) that "recognized" Indian title claims have been improperly included in the Government's compilation. The Indian claimants may be asserting a "recognized" title in the cases referred to, but whether they have such title has been put in issue by the Government, which contends that the claimants had no more than "original Indian title". Such is Docket No. 67, Miami Tribe (cited by re-

[2] In the *Ponca* case, as in many others, the claim is that since the agreement by treaty to accept inadequate consideration was procured by fraud, the treaty agreement was null and void and that, therefore, lands were taken without any agreement whatsoever. With respect to this case (Docket No. 323, Ponca), respondent states (Br. in Opp., pp. 21-22): "Petitioner lists Docket 323 as claiming 13 million acres although it claims only about 90,000 acres and those 90,000 acres were a treaty reservation—recognized title." Reference to the Government's compilation (App. A, p. 4a) will show a claim of 7,000,000 acres rather than 13,000,000 acres, and reference to the petition filed by the Poncas will show that the Government's figure is accurate and that the treaty reservation claim of 60,000 (not 90,000, as stated by respondent) acres is only one of many claims asserted therein. We do not, of course, concede that every treaty reservation is held under "recognized" title.

spondent, Br. in Opp., p. 21), in which the Indian Claims Commission has entered an interlocutory order adjudging that the tribe held lands by a "recognized" title. But that case is still pending in the Commission, and the Government has not conceded the correctness of the interlocutory order.

Other inaccuracies.—Forgetting that one of its claims has been remanded to the Commission and ignoring the fact that the award in two other claims is not yet final, respondent objects to the inclusion of its own claim in the Government's compilation (Br. in Opp., p. 21). Respondent also unreasonably objects to the listing of Docket No. 172 (Yuchi) on the ground that this case was dismissed with prejudice. The fact is that on July 19, 1955, the claimant filed a notice of appeal to the Court of Claims from the dismissal, so that undeniably the case is still pending.

Respondent's charges of "gross carelessness or a complete loss of objectivity" (Br. in Opp., p. 22) are thus completely unjustified.

CONCLUSION

For the reasons already stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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